

Cultural Resources Management

Handbook for Lakes Operations Managers



United States Army Corps of Engineers
Fort Worth District
Piney Woods / Sam Rayburn Projects

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PREFACE

This handbook does not establish policy nor set precedent for either the U.S. Army Corps of Engineers (USACE) or the Fort Worth District (CESWF). It is intended for use by Lakes Operations Managers and other personnel located at CESWF operating lakes in the East Texas geographic region. The guide is intended as an overview and resource guide in understanding the complexities of cultural resources management. For specific USACE policy and regulations associated with cultural resources management on operating projects, the reader should review Engineer Pamphlet (EP) 1130-2-540 (*Project Operations: Environmental Stewardship and Maintenance Guidance and Procedures*) specifically Chapter 6 (*Cultural Resources Management*), ER 1130-2-433 (*Project Operations: Collections Management and Curation of Archeological and Historical Data*), ER 200-2-2 (*Environmental Quality: Procedures for Implementing NEPA*), and ER 200-2-3 (*Environmental Quality: Environmental Compliance Policies*).

Reading this handbook should provide lakes management personnel with a basic understanding of the requirements associated with legal mandates that direct all Federal agencies to give full and due consideration to the variety of cultural resources properties. Also, the review of the handbook should provide lakes management personnel with a basis of understanding regarding the proper management of such resources as well as the need to consider the opinions of other members of the public in this management.

The purpose of this handbook is to provide information regarding cultural resources responsibilities in as succinct a manner as possible. This handbook is not meant to replace, or be substituted for, a Historic Properties Management Plan (HPMP) as required by EP 1130-2-540.6-8(f). An HPMP is a thorough document that identifies the types of resources present at an operating project and provides a comprehensive programmed approach to direct historic preservation activities at the operating project as well as identify objectives in the management of such resources. Each operating project should identify the need for an HPMP, identify appropriate funding to prepare such a document, and develop the document in close coordination and consultation with the managing project offices, interested and consulting parties, and other agency reviewers as necessary.

For specific operating project guidance and project review within the East Texas area of Fort Worth District boundaries, a cultural resources manager is assigned to the Piney Woods and Sam Rayburn Projects. Additional expertise is located in the Readiness Branch of the Operations Division (CESWF-OD-R) located in the Fort Worth offices of CESWF. Other sources of expertise are also available within CESWF. Personnel with experience in all phases of cultural resource management are located within the Regulatory Branch, and the Environmental Resources Branch, of the Planning, Environmental and Regulatory Division, of the Fort Worth District.

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INTRODUCTION

The goal of this handbook is to introduce a general overview of cultural resources management and to provide assistance with incorporating the requirements associated with cultural resources management into lakes operations through effective planning and execution. The handbook is by necessity limited by size and therefore cannot serve as a step-by-step guidance document. However, it provides a basis for understanding what cultural resources are, applicable legal statutes and regulatory areas of consideration, and basic processes. It also identifies suitable management approaches to ensuring a program of cultural resources considerations is maintained that reflects the spirit and intent of the legislative and regulatory mandates.

Because the scope of this document is not meant to be an all-inclusive manual on cultural resources management, only a broad overview of the principle legal requirements typically encountered on operating projects within the East Texas geographic boundaries of CESWF is provided for discussion in the components and responsibilities section of this handbook. This should not be taken to be a definitive or final list, and Lake Managers and other operations personnel need to be not only aware of the applicable USACE regulations, but also of the applicability of other legal or regulatory mandates, some of which are identified in the laws and regulations section, and which are not always addressed in the USACE regulations. Further, the reader should be aware of the overlapping areas of responsibility created by the various legislative mandates. For example, compliance with the requirements of the *National Historic Preservation Act* does not necessarily satisfy the requirements of the *National Environmental Policy Act*. Similarly, the completion of both the Section 106 requirements of the *National Historic Preservation Act* and the preparation of a *National Environmental Policy Act* document does not complete the requirements to consider potential *Native American Graves Protection and Repatriation Act* issues.

The use of **boldface** type in this handbook indicates a further reference in the Definitions section. The use of *italics* is the title of legislation, regulation, or other guidance. The use of ***boldface italics*** is a notation of a statutory section.

Lake Managers should establish review and coordination procedures that allow for early consideration of potential project impacts and applicable legal mandates. The early review of planned activities by the Piney Woods / Sam Rayburn Projects cultural resources manager will ensure that full consideration of the activity's potential impacts are considered, that appropriate consultation requirements are met, and all alternative approaches are considered.

It is critical to understand that legal compliance with these laws and other mandates is not avoidable. Ignoring the requirements, the coordination responsibilities, or waiting until the last minute to begin consideration of cultural resources requirements can, and usually will, result in legal challenges and delays. Both of which can be career and promotion inhibiting.

CULTURAL RESOURCES

The term, “**cultural resources**” is a broad reference to the sum of the human experience which has significance to us either through their physical presence or through an association of ideas or practices. It can include prehistoric and historic period archeological sites, buildings and structures, written records, and traditional cultural properties. Properties such as the Mission San Antonio de Valéro (the Alamo) in San Antonio, Texas, Caddoan Mounds State Park near Alto, Texas, the Declaration of Independence housed at the National Archives in



Washington, District of Columbia, and the U.S.S. Missouri berthed at Pearl Harbor, Hawaii, are all visible reminders of their significance and association with this country's history.



Properties of a traditional cultural significance can also be visible such as the association of traditional Comanche tribal practices at Medicine Bluff at Fort Sill, Oklahoma, or throughout the southwest where the aboriginal peoples of this continent painted and chipped out designs on rocks and cliffs. Additionally, an entire class of cultural resources is attributable to properties that are not readily apparent or perceptible. The religious and social practices of traditional groups, both **Native American Indians**



and those of other ethnic backgrounds, are to be considered types of cultural resources. Ceremonies, hunting practices, plant-gathering, and social practices which are performed in order to maintain social or ethnic boundaries, are also cultural resources. An especially significant traditional resource can be the burial places of prehistoric and historic period Native American Indians.

Typically, Federal agencies attempt to place cultural resources in a class of special properties identified as “**Historic Properties.**” Historic properties are those properties that are eligible, or included in, the ***National Register of Historic Places*** such as the Alamo or the U.S.S. Missouri. While this designation may include places of traditional significance such as Caddoan Mounds or Medicine Bluffs, it does not extend to properties which have no real property referent and it does not include such things as the religious ceremonies or plant-gathering activities themselves. However, because a property or practice cannot be determined to be eligible for, or listed in, the ***National Register of Historic Places***, it does not mean that an agency can disregard any further

consideration as a cultural resource. The importance of certain practices by certain ethnic, minority, or low-income, communities, whether it is the harvesting of specified animals at particular times of the year, maintaining a local community meeting square, or insuring that religious practices are not interfered with, is critical to maintaining a spirit of stewardship.

For the East Texas Lakes, a consideration of the sacred significance of specific archeological sites and burial places associated with the Caddoan occupation of the geographic area is an important consideration in lakes management. These places represent a component of Caddo culture history and are significant in that they are the physical manifestations of Caddo heritage. Much like the historical and national significance attached to the Tomb of the Unknowns or the Gettysburg Battlefield, the Caddo place special emphasis on these properties as links to their historical past as well as being the spiritual locations of their ancestors.

LAWS, REGULATIONS, and STANDARDS

Numerous legislative, regulatory, standards, and Presidential orders have been implemented to direct cultural resources management. These include but are not limited to:

LEGAL AUTHORITIES

Abandoned Shipwreck Act of 1987 (PL 100-298; 43 USC 2101-2106 *et seq.*); *Antiquities Act of 1906* (PL 59-209; 16 USC 431-433 *et seq.*); *American Indian Religious Freedom Act of 1978* (PL 95-341; 42 USC 1996 and 1996a); *Archeological and Historic Preservation Act of 1974* (PL 93-291; 16 USC 469-469c *et seq.*); *Archeological Resources Protection Act of 1979* (PL 96-95; 16 USC 470aa-mm *et seq.*); *Architectural Barriers Act of 1968* (PL 90-480; 42 USC 4151 *et seq.*); *Federal Records Act of 1950* (PL 90-62; 44 USC 3101 *et seq.*); *Historic Sites, Buildings, Objects and Antiquities Act of 1935* (PL 74-292; 16 USC 461-467); *National Environmental Policy Act of 1969* (PL 91-190; 42 USC 4321 *et seq.*); *National Historic Preservation Act of 1966* (PL 89-665 through PL 102-575; 16 USC 470 *et seq.*); *Native American Graves Protection and Repatriation Act of 1990* (PL 101-601; 25 USC 3001-3013 *et seq.*); *Public Buildings Cooperative Use Act of 1976* (PL 94-541; 40 USC 601 *et seq.*); *Reservoir Salvage Act of 1960* (PL 86-523; 16 USC 469 *et seq.* (amended by PL 93-291 *Archaeological and Historic Preservation Act*)).

Acts are legislatively mandated and become part of our system of laws.

Note: PL is Public Law; USC is United States Code; CFR is Code of Federal Regulations; and FR is Federal Register.

REGULATIONS

Construction and Alteration of Public Buildings (41 CFR 101-19); *Curation of Federally-Owned and Administered Archeological Collections* (36 CFR 79); *Determinations of Eligibility for Inclusion in the National Register of Historic Places* (36 CFR 63); *Disposition of Federal Records* (36 CFR 1228); *Minimum Guidelines and Requirements for Accessibility Design* (36 CFR 1190); *National Historic Landmarks Program* (36 CFR 65); *National Register of Historic Places* (36 CFR 60); *Native American Graves and Repatriation Act: Final Rule* (43 CFR 10); *Preservation of American Antiquities* (43 CFR 3); *Procedures for State, Tribal, and Local Government Historic preservation Programs* (36 CFR 61); *Protection of Archeological Resources* (32 CFR 229); *Protection of Historic and Cultural Properties: Regulations Implementing the Section 106 Process* (36 CFR 800 (revision dated 18 May 1999)).

Regulations guide implementation of Public Laws, or Acts. For example: 43 CFR 10 (*Native American Graves Protection and Repatriation Act: Final Rule*) is the implementation of the *Native American Graves Protection and Repatriation Act of 1990* (PL 101-601); similarly, 36 CFR 800 implements a single portion of the *National Historic Preservation Act*, Section 106.

GUIDELINES

Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines (48 FR 44716); Guidelines for Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act (53 FR 4727-46); Preparation of Environmental Impact Statements: Guidelines (40 CFR 1500); The Secretary of the Interior's Standards for Rehabilitation (36 CFR 67); The Secretary of the Interior's Standards for the Treatment of Historic Properties (36 CFR 68).

Guidelines and Standards are issued as goals to be met, or exceeded. They are not regulatory nor are they legislatively mandates

PRESIDENTIAL ORDERS

Protection and Enhancement of the Cultural Environment (1971): EO 11593; Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (1994): EO 12898; Locating Federal Facilities on Historic Properties in our Nation's Central Cities (1996): EO 13006; Protecting Indian Sacred Sites (1996): EO 13007; Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes: Presidential Memorandum 29 April 1994; Government-to-Government Relations with Native American Tribal Governments: Presidential Memorandum 29 April 1994.

Presidential Executive Orders and Memoranda are issued to direct the Federal Government or Federal agencies to follow certain policies as specified by the President of the United States.

CULTURAL RESOURCES RESPONSIBILITIES

Cultural resources management is a government-wide responsibility. For USACE and this district it is of particular concern at operating lakes projects because of the many maintenance, construction, and natural resource management projects undertaken. A policy statement on cultural resources management as found in Engineer Pamphlet (EP) 1165-2-2 for the civil work's program is:



“Cultural resources management is an equal and integral component of natural resource management at operating civil works projects. Further, our traditional view of cultural resources as representative of only the non-living and non-renewable components of natural resources as discussed under Section 101(b) of (the) *National Environmental Policy Act* is changing. Today, as we gain greater insights and knowledge of other cultures, we are realizing that landscape features can have significant cultural significance as well as corresponding ecosystem values. Thus, it is the policy of the Corps to identify, evaluate, and manage cultural resources that are eligible for listing in, or listed in, the *National Register of Historic Places*. Associated with this policy is the Corps responsibility to ensure that cultural resource management activities are consistent with Federal laws and regulations pertaining to Native American rights, curation and collections management, and protection of resources from looting and vandalism.” [EP 1165-2-2:19-37; p.19-22]



It is appropriate to add to the preceding that it is also in the spirit of stewardship for the Corps to consider cultural resources management of traditional resources which are not necessarily *National Register of Historic Places* eligible or listed properties, but are of special significant to both Native American Indians and other traditional groups as important to sustaining their culture.

Simply stated, the Corps should implement all cultural resources management in a positive manner that fulfills the spirit as well as the letter of laws, regulations, and policies, for all project undertakings in an environmentally and economically sound manner, and in the interest of the American public. In order to accomplish this, cultural resources issues should be addressed at the earliest stages of planning. In order to protect historic properties and other properties, avoid unnecessary delays, conflicts, and costs, cultural resources professionals should be involved from project development, budget formulation and scheduling, through implementation. Waiting until project specifications





and notices to proceed with construction are imminent before considering cultural resources responsibilities is not only likely to produce delays and possibly modifications to planned projects, it can also be a violation of Federal regulations and legal mandates. Ignoring cultural resources responsibilities will likely result in legal challenges to projects, thus delaying them, but it also can result in criminal penalties in some specific areas of legal compliance.

It is of critical importance that Lakes Managers understand that almost any project has the potential to impact the broad range of cultural resources. However, through proper planning and coordination, most project impacts can be avoided entirely with no delays in completion and little if any additional costs.

CULTURAL RESOURCE COMPLIANCE

As noted previously in this handbook, there are a multitude of cultural resources laws, regulations, and orders that direct the consideration, management, and direction of cultural resources management in this country. This section will review four of the principle legislative mandates which have applicability to operating lakes projects on a broad scale, the *National Historic Preservation Act of 1966*; the *Archeological Resources Protection Act of 1979*; the *National Environmental Policy Act of 1969*; the *Native American Graves Protection and Repatriation Act of 1990* and any associated regulations. Additionally, the requirements associated with the *American Indian Religious Freedom Act of 1978*; the policy on *Protecting Indian Sacred Sites*; the *Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes*; and the consultation requirement associated with *Government-to-Government Relations with Native American Tribal Governments*, is provided. Following this is a brief discussion on archeological curation (36 CFR 79). As part of the review and applicability of these mandates a later section will provide a discussion of coordination and consultation requirements for Native American Indians and other interested or **consulting parties**.

NATIONAL HISTORIC PRESERVATION ACT

The *National Historic Preservation Act of 1966* (NHPA) is the principle historic preservation legislation affecting Federal cultural resources management responsibilities and is the most familiar requirement for operating lakes projects. This Act sets forth a general policy of supporting the preservation of historic and prehistoric properties by the Federal government for the benefit and education of the people of the United States. The law states that the Federal government will financially and technically assist efforts to preserve aspects of prehistoric and historic heritage in the United States, and will administer Federally-owned historic and prehistoric resources. The Act authorized the expansion of the *National Register of Historic Places* (NRHP) [36 CFR 60]. The NRHP is a listing composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering and culture. The law established a **State Historic Preservation Officer** (SHPO) for each of the individual States and Territories of the United States to oversee and comment of historic preservation activities in those States and Territories, and to insure that NRHP eligible properties are taken into account during planning and development. The law also established the **Advisory Council on Historic Preservation** (ACHP), an independent Federal agency which is required to advise the President, the Congress, and other Federal agencies on matters relating to historic preservation, and to review policies and programs of Federal agencies in order to improve their effectiveness and efficiency. In addition, the 1992 amendments to the NHPA established the potential for **Federally-recognized Native American Indian** tribal groups to identify a **Tribal Historic Preservation Officer** (THPO) to act in the role of, or in concern with, the SHPO, on reservation or tribally-owned lands (**Tribal Lands**). For CESWF operating lakes in East Texas, there is no requirement to coordinate with a

The NHPA and particularly Section 106 of the Act do not prevent an action or undertaking from being completed. The Act and the implementing regulation for Section 106 compliance require only that the appropriate processual steps be met and due consideration of potential effects to historic properties be given. If the regulatory steps are not met, or if they are ignored, that set of circumstances is the basis for legal actions by the public.

THPO. Any additional references to SHPO/THPO consultation is meant for informational purposes only and should be taken only to mean SHPO consultation only.

Whether or not a property is eligible for listing in the NRHP is of significant interest to this subsection and will be discussed as it relates to four important sections of the law (Section 106; Section 110; Section 111; and Section 112). In general, NHPA Section 106 addresses the compliance aspects that are most applicable to Corps projects including those most typically encountered on operating projects, while sections 110, 111, and 112 address management responsibilities. Because Section 106 is the most often encountered regulatory area encountered by operations lakes managers and personnel, it is discussed here more in depth, and at length, than the other subject areas.

Section 106

Section 106 of the NHPA states:

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or Federally-assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.” [16 USC § 470f]

A key understanding of Section 106 is the term, **“undertaking.”** Undertaking means:

“(A) project, activity, or program funded in whole or in part under the direction of a Federal agency, including those carried out by or on the behalf of a Federal agency; those carried out with Federal assistance; those requiring a Federal permit, license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.” [36 CFR § 800.16(y)]

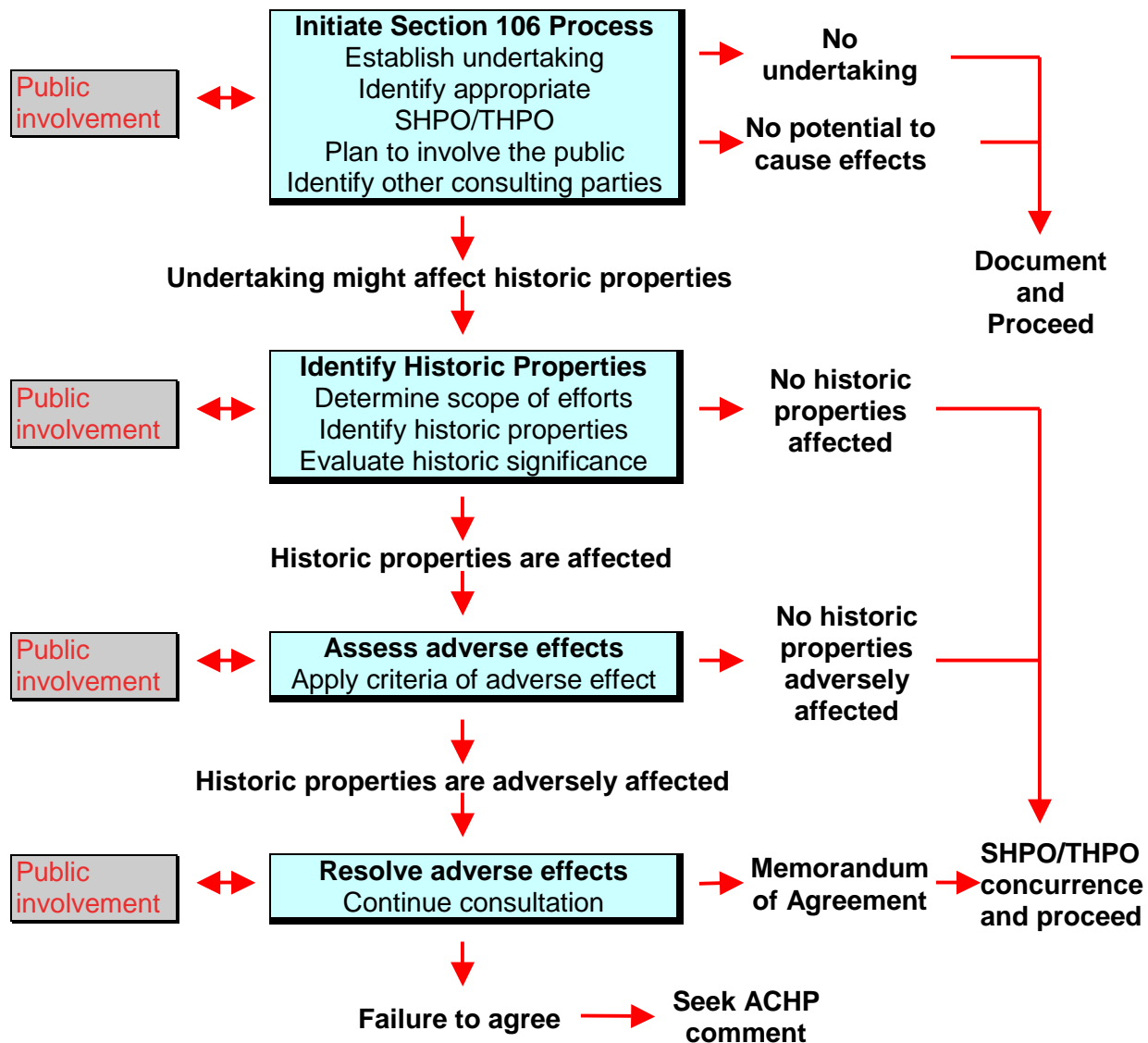
Examples of undertakings:

- Construction and ground disturbing activities, including gatehouse and boat ramp construction, borrow areas, construction staging areas, and access road construction and maintenance;
- Issuance of outgrants, ingrants, and permits, including bare use licenses;
- Demolition and disposal activities;
- Maintenance, repairs and alterations of buildings, facilities, and water control structures;
- Changes in land use;
- Excess, sale and leasing of property, buildings or structures;
- Timber harvests (including haul roads, log set locations, and tree planting);
- Remediation activities; and
- Disposal of records.

This particular section of the NHPA has its own implementing regulation [36 CFR 800]. The regulation (*Protection of Historic and Cultural Properties: Regulations Implementing the Section 106 Process*), sometimes called the “Section 106 Process” or the “Part 800 Process,” was recently revised (18 May 1999) and essentially provides the step-by-step procedures to comply with this portion of the Act. The purpose of the process is to

accommodate historic preservation concerns with the needs of Federal undertakings through a process of consultation. A flow chart outlining this process follows:

Section 106 / Part 800 Process Flow Chart



Simply, Section 106 of NHPA requires any Federal agency to take into account the effect of an undertaking on historic properties. This consideration of effect is not confined to the major command level. It is applicable to every field-operating agency as well. As noted, the Part 800 Process provides the procedural steps to make this determination of effect but it is a discursive series of steps that requires a lengthier document to adequately explain. For the purposes of this document, a much-abbreviated discussion is provided which provides the reader with an overview of the process. The applicable sections are referenced if the reader wishes to explore the

subject further. The 18 May 1999 revisions to the Part 800 Process changed procedurally how an agency consults on Section 106 undertakings. The most obvious changes are the removal of the 15 day “no effect” determination response from the regulation, “no adverse effect” determinations are no longer reviewed by the ACHP, the ability of the agency and the SHPO/THPO to negotiate a two-party **Memorandum of Agreement** on the majority of actions and undertakings without ACHP involvement, and the ability of the agency to utilize the process and documents prepared as part of compliance with the National Environmental Policy Act for Section 106 compliance as well. The most significant change to the Part 800 Process is the requirement to consult at a significantly increased level with Native American Indian tribal groups and other public(s), as well as ensuring any organization or individual with a demonstrated interest in the outcome of the undertaking on historic properties is invited to participate in the Part 800 Process as a **consulting party**.

Consulting parties are Native American Indian tribes and other interested parties or organizations (historic preservation societies, professional groups, local governments, other ethnic or minority groups, and individuals with a demonstrated interest in the outcome of the undertaking or project).

The first requirement is to establish if an undertaking exists [36 CFR 800 § 800.3(a)]. As defined earlier, an undertaking exists when there is a potential to cause effects on historic properties. Note that the potential to cause effects is just that, a potential. There is no requirement at this point to have identified the presence or absence of NRHP eligible or listed properties. In general, almost any action can be interpreted as one in which an **historic property** could be affected. A common sense approach is required. Changing a light bulb is not considered an undertaking and no further obligations under Section 106 would be required. Changing the entire fixture if it was an original component of an historic property would be an undertaking and the requirements of Section 106 would have to be met. If the agency (also the **Agency Official** in this handbook) can confirm that an undertaking will not have any potential to affect known or unknown historic properties, the agency can make a determination of **No potential to cause effects** [36 CFR § 800.3(a)(1)] and there is no further Section 106 requirement. Be aware that making a determination that there are no further Section 106 requirements to consider historic properties does not satisfy other cultural resources considerations such as access by Native American Indian tribal or other traditional groups such as the access and non-interference provisions of EO 13007 (*Sacred Sites*), issues associated with the *Native American Graves Protection and Repatriation Act*, archeological site protection per the *Archeological Resources Protection Act*, or other cultural considerations of the *National Environmental Policy Act*.

If the agency determines there is an undertaking present, the agency must consult with the respective state SHPO (or THPO, if applicable) to determine the **Area of potential effect** (APE) [36 CFR § 800.4(a)1]. This regulatory change is slightly different from the previous version of the Part 800 Process where the agency was able to make a determination of the APE before consulting with the SHPO/THPO. The APE can be very small (changing windows or doors and hardware; excavation to place a pipeline; or construction of a gatehouse or restroom), medium (the placement of a new marina or construction of a park), or very large (a planned pool raise of a lake, or a planned timber harvest, which can encompass thousands of acres). It can also be applicable to only a portion of the project if it can be demonstrated that only a specific part of the project or

Examples of an APE:

- Construction or raising of a dam would include adjoining properties if it would interfere with the viewshed;
- Removal of generating equipment original to an early powerhouse;
- Creating a recreation area that would increase traffic or noise in a historic area or in an area of traditional significance to a Native American Indian tribe.

undertaking could affect a historic property. This project specific APE must be clearly demonstrated and a thorough understanding of potential impacts to both known and potential historic properties presented. If the project has the potential to impact or affect properties that are not directly adjacent to the project undertaking area, the project would have to consider those impacts as part of the planning and design process.

During this early consultation period, the agency must plan to involve the public [36 CFR § 800.3(e)] according to the nature and complexity of the undertaking and also begin identification of potential consulting parties [36 CFR § 800.3(f)]. Both the **public** and **consulting parties** shall be permitted to participate throughout the Section 106 Process. The agency has a duty to consider public and consulting party comments, however, the final decision on how to proceed still remains with the agency.

After the agency has identified an undertaking, determined the APE, notified the public as appropriate to the project, and identified any consulting parties, the agency must begin the **Identification of historic properties** [36 CFR § 800.4] that could be affected by the project. This is accomplished in close consultation with the respective SHPO/THPO and is an attempt to identify, in a good faith effort, any known or unknown historic properties that could be within the APE. The agency reviews (in consultation with the SHPO/THPO) existing information (including previous efforts in the same project area, obtaining information from local sources and Native American Indian tribal groups, and other archival sources such as archeological repositories, museums, etc.), determines the scope or level of effort which is needed to complete inventories (also called surveys) in the APE, completes any required inventory efforts needed to identify possible historic properties, and make a determination of eligibility for the NRHP. If the project area and APE has been surveyed or previously inventoried to the requirements of the SHPO/THPO and no properties were discovered, then the agency can make a determination that there is **No potential to cause effects** [36 CFR § 800.3(a)(1)] early in the process and no further Section 106 consideration is required. If the project area and APE has had historic properties previously identified which have already been determined eligible for, or are listed in, the NRHP, and no additional inventory is needed, the agency does not need to conduct an inventory effort and can proceed to make a determination of whether the historic properties will, or will not, be affected as part of the identification and evaluation phase. However, if the identified historic property would not be affected by the project in any way, a determination of **No potential to cause effects** is warranted as well. A memorandum for file that describes the planned activity, any previous and current efforts to identify historic properties, and the action or reason why the activity will not impact any historic property should always accompany any such determination.

Generally, small survey and inventory efforts and impact assessments are completed on most small projects utilizing existing CESWF Operations Division cultural resources personnel. Larger projects are generally a contracted effort and are provided technical oversight by the CESWF Operations Division cultural resources staff. Both in-house and

contracted efforts, including the personnel providing the investigative services and assessments, are to meet professional standards as developed by the **Secretary of the Interior** and it is the responsibility of the agency to ensure those qualifications are met. This directive is found at Section 112(a)(1)(A) of the NHPA, but at this time the Secretary has not prepared the standards for issuance as a regulation. The interim guidance for professional qualifications for historic preservation personnel is: *Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines* [48 FR 44716]. A general requirement for most senior personnel is an advanced degree in their appropriate field of study and/or requisite experience. Technical personnel must meet similar requirements for a four-year degree and/or requisite experience.

Evaluation of eligibility of historic properties to the NRHP is probably the most critical part of the Section 106 Process and actually determines if the process is complete with no further considerations or if the process proceeds to consider any project impacts on the property. This phase is completed as part of the **Identification of historic properties** [36 CFR § 800.4]. Properties identified during the survey and inventory efforts are to be evaluated according to the criteria for listing in the NRHP as discussed in: *Determinations of Eligibility for Inclusion in the National Register of Historic Places* [36 CFR 63]. It is in the best interests of the agency to closely review all recommendations of eligibility, especially if prepared by a contracted effort, and ensure that the agency position is incorporated into the consultation with the SHPO/THPO. Usually, recommendations of NRHP eligibility are associated with one or more of the four criteria of a significant event (a), associated with a significant person (b), are of a distinctive type (c), or possess important information (d). Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the NRHP. However, such properties will qualify if they meet any of the exceptions to the criteria (*Criteria considerations* [36 CFR § 60.4]). These considerations typically take the properties generally evaluated as not eligible and infers eligibility if they can broadly be shown to have significance as a result of architectural or

In general, the criteria for listing in the NRHP [36 CFR § 63.4] are those properties that demonstrate:

"The quality of significance in American history, architecture, archeology, engineering, and culture (that) is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history."

Properties may meet either single or multiple criteria to be NRHP listed.

artistic distinction (including cemeteries), recent historical importance, of architectural value, the only surviving property associated with a historic person or event, reconstructed accurately in a suitable environment, commemorative but having special significance (such as the Tomb of the Unknowns), or less than 50 years of age because it is of exceptional importance. This less than 50-year significance criterion is especially important when considering properties associated with the Cold War (1946-1989). The less than 50 year of age criterion will not typically apply to properties located on operating lakes projects. The only foreseeable application of this criterion would be any construction or engineering feature that utilized design features not previously employed elsewhere.

If a survey or inventory effort determines that no historic properties are located within the APE, or that the project has no potential to affect any identified historic property(ies) (**No historic properties affected** [36 CFR § 800.4(d)(1)]), including any previously identified NRHP eligible or listed properties, the agency provides documentation as specified [36 CFR § 800.11(d)] to the SHPO/THPO, notifies any participating Native American Indian tribes and consulting parties of the finding, makes the documentation available to the public, and awaits the determination of the SHPO/THPO. The agency and SHPO/THPO do not have to agree on eligibility determinations or level of effect. Generally, if there is a disagreement on eligibility [36 CFR § 800.4(c)(2)] the agency must request a determination of eligibility [36 CFR § 60.2] from the **Keeper of the National Register** (Keeper). If there is a general disagreement about level of effort or effect, either the agency or the SHPO/THPO can seek a review from the ACHP. However, it is in the best interests of the agency and the SHPO/THPO to attempt to resolve any issues of eligibility, effort, or level of effect in consultation as any involvement of the Keeper or the ACHP could cause significant fiscal and time losses.

The SHPO or THPO has 30 days to respond to any agency request for review or on a determination from the day of SHPO/THPO receipt of the request [36 CFR § 800.3(c)(4)].

The Keeper has 45 days in which to respond to an eligibility determination after receipt.

The ACHP has 30 days in which to respond to a request for level of effort or effect review after receipt.

If the SHPO/THPO, ACHP, or Keeper, notify the agency that the provided information is inadequate, the agency must resubmit the requested information and the timeframe for review begins again.

If the agency, or the SHPO/THPO as a result of an earlier determination response to the agency, determines that an historic property will be affected [36 CFR § 800.4(d)(2)], the agency consults with the SHPO/THPO, and notifies any participating Native American Indian tribes and consulting parties of the finding that there may be historic properties which may be affected by the undertaking and that this effect may be adverse. Note that any effect can be detrimental (negative) or beneficial

(positive) but it is considered adverse as a point of departure for consultation. The agency and the SHPO/THPO then consult to provide an **Assessment of adverse effects** [36 CFR § 800.5]. An adverse effect is when any undertaking, either directly or indirectly, may alter any of the characteristics that make the property eligible for the NRHP. Adverse effects can also be those effects that are not readily apparent but could be considered cumulative and are farther removed in time. That is, future conditions that could result from a current undertaking, such as the future development of an area

receiving flood protection, are to be considered for effect. Part of this consultation must include Native American Indian tribes, consulting parties, and the views of the public.

Examples of adverse effects:

- Physical loss or damage to the property;
- Alteration, repairs, maintenance, or rehabilitation inconsistent with stated guidelines;
- Change in character or setting, including visual or audible characteristics;
- Neglect or deterioration; and
- Transfer, sale or lease without adequate conditions to ensure preservation (this includes grazing leases, marina permits, and other uses of Federally-owned lands which may have historic properties associated or potentially impacted through changes in land use to the project area (APE)).

Applying the assessment of adverse effect is another significant departure area in the Section 106 process. As stated, an adverse effect is when the project or undertaking will alter the property in some manner, either directly or indirectly. If an agency can provide documentation to the SHPO/THPO to show that an undertaking does not meet the criteria of an adverse effect, that is, demonstrate that an undertaking or project will not alter or change the property significantly or if it can be shown that the alteration, impact, or other effect to the property will be consistent with specified guidelines for treatment of historic properties (including relocation of the project, alteration of the plans, or when in accordance with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* [36 CFR 68]), a determination of **No adverse effect** [36 CFR § 800.5(b)] may be made. A change from the previous Part 800 regulation here is that the ACHP no longer reviews **No adverse effect** determinations when the agency and the SHPO/THPO agree as to the outcome. As is always the case, such a finding must be made in consultation with the SHPO/THPO, Native American Indian tribal groups, other consulting parties, and made available to the public. If the agency and the SHPO/THPO, or any consulting party, are in **Disagreement with the finding** [36 CFR § 800.5(c)(2)], the agency is to consult with the objecting party to resolve the issue or the agency will request the ACHP to review the finding. Obviously, it is in the best interests of the agency to resolve any issues before involving additional comments from the ACHP.

If an agency cannot demonstrate that the undertaking can successfully avoid impacts to historic properties (or if the undertaking's impacts on historic properties are unknown and unpredictable), the result is generally a finding of **Adverse effect** [36 CFR § 800.5(d)(2)]. Simply, this means that the impacts to historic properties are unavoidable, the project will occur, and no other options are available. This should never be taken to mean that a project is doomed or cannot be completed as planned. Nothing in the Act, Section 106, or the Part 800 regulation prevents the execution of a project. However, there must be a **Resolution of adverse effects** [36 CFR § 800.6], or at least an attempt to resolve the adverse effect, before the undertaking may proceed. Not every adverse effect can be mitigated nor is a defined standard set of procedures with which offset adverse impacts available. Each situation is usually different and a plan for mitigation should be the subject of a consultation effort between all parties. Some resolutions, such as the complete excavation of all data from an archeological site, are just general examples but are not always applied. Certainly, alternatives to complete excavation, such as preparing museum displays or educational programs, should be explored.

Examples of adverse effect resolutions include:

- Conducting appropriate data recovery on archeological sites;
- Preparing documentation (photographs, drawings, producing a historic video) which records the significant features of a building or structure;
- Preservation of selected properties while allowing the loss of others (sometimes called mitigation banking);
- Applying preservation restrictions (covenants) to specific properties as a way to ensure their preservation and/or avoidance; and
- Agreement that the loss of the historic property cannot be mitigated but that the adverse loss must be accepted in the best interests of the public (such as a result of emergency operations).

Consultation to resolve adverse effects can be a lengthy process and remains a critical part of completing Section 106 consultations on unavoidable impacts to historic properties. Simply, **Resolution of adverse effects** means the development of appropriate measures to avoid, minimize, or mitigate adverse effects to historic properties. As noted previously, an adverse effect is when any undertaking, either directly or indirectly, may alter any of the characteristics that make the property eligible for the NRHP. During this level of consultation on resolving adverse impacts, the ACHP must be notified that a consultation on an adverse effect determination is ongoing between the agency and the SHPO/THPO. If the ACHP decides to participate in the consultation it will notify the agency and all consulting parties within 15 days [36 CFR § 800.6(a)(1)(iii)]. The ACHP must be invited to participate in the consultation when: the agency, SHPO/THPO, Native American Indian tribe, or any other consulting party requests such participation; there will be an effect on a **National Historic Landmark** (NHL); or when a **Programmatic Agreement** [36 CFR § 800.14(b)(1)] is to be prepared. In most cases, the typical outcome of consultation on resolving the majority of adverse effect determinations will result in the preparation of a **Memorandum of Agreement** [36 CFR § 800.6(c)], a legally binding document which records

the terms and conditions to be applied to an undertaking to resolve the adverse effects. If the agency and SHPO/THPO can reach agreement, in consultation any participating Native American Indian tribe or other consulting parties, and without ACHP involvement, the Memorandum of Agreement may be executed by the agency and SHPO/THPO as signatories and a copy submitted to the ACHP along with the appropriate documentation [36 CFR § 800.11(g)]. Native American Indian tribes or other consulting parties may be invited to concur with the conditions set forth in the Memorandum of Agreement and sign the document but their signature is not required.

A Programmatic Agreement is usually prepared when:

- An undertaking will have similar, or possibly unknown, effects, on a number of historic properties;
- The actions are repetitive and routine;
- When non-Federal parties are responsible participants in the activities; and
- Where a non-standard Section 106 process is needed.

A Memorandum of Agreement is usually prepared when:

- An undertaking will have adverse effects on one, or a limited number, of historic properties;
- The impact is discrete and can be reduced or mitigated;
- When the impact is unavoidable and cannot be mitigated; and
- Where the undertaking and its effects are not complex.

In general, if certain conditions as suggested in: *Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines* [48 FR 44716]; *The Secretary of the Interior's Standards for Rehabilitation* [36 CFR 67]; or *The Secretary of the Interior's Standards for the Treatment of Historic Properties* [36 CFR 68], can be met, it is relatively easy to define methods with which to resolve adverse effects to historic properties.

Occasionally, the attempt to reach a resolution on how to mitigate an historic property breaks down because of disagreement on level of effort, requirements, or simply because neither party is willing to make a counteroffer. If consultation is unable to reach resolution to resolve adverse effects, and all appropriate steps have been taken to ensure all parties have had input and all regulatory steps have been met, the agency, SHPO/THPO, or ACHP may make the determination of a **Failure to resolve adverse effects** [36 CFR § 800.7]. This is essentially a **Termination of consultation** [36 CFR § 800.7(a)] and can have different outcomes depending on who and how the termination is issued. If the agency terminates the consultation, the head of that agency (typically, the chief official of the Federal agency such as the Secretary of the Army), the Assistant Secretary or other officer with department-wide or agency-wide responsibilities (such as the **Federal Preservation Officer** (FPO) (note that there is an FPO for USACE civil works and another FPO for Department of Army military undertakings)) must request the **Comments by the ACHP** [36 CFR § 800.7(c)] on the termination. If the SHPO terminates consultation, the agency and the ACHP may continue to consult without SHPO participation and then execute any appropriate document. If a THPO terminates consultation for undertakings on tribal lands, the ACHP will provide comment [36 CFR § 800.7(c)] to the agency. If the ACHP terminates consultation, the ACHP will notify the agency and provide comments to all consulting parties [36 CFR § 800.7(c)(1)]. Comments prepared by the ACHP in response to a **Termination of consultation** are to be delivered to the head of the agency requesting the comment, the agency's Federal Preservation Officer, and all consulting parties, within 45 days of the receipt of the request for comment [36 CFR § 800.7(c)(2)]. The head of the agency then has the duty of preparing a **Response to ACHP comment** [36 CFR § 800.7(c)(4)] which contains a consideration of the ACHP comments and documents the final agency decision back to the ACHP. The agency then provides copies of the response to all consulting parties, makes the entirety of the documentary record available to the public, and proceeds with the undertaking. While this may be legally satisfactory and completes all compliance aspects, public opinion will likely continue to challenge the undertaking.

Following the process to the preceding conclusion is different from that associated with the issuance of a **Letter of foreclosure** by the ACHP. If there is an **Agency foreclosure of the ACHP's opportunity to comment** [36 CFR § 800.9(b)] because an agency has not met, or even attempted to meet, the standard Section 106 / Part 800 Process, a letter of foreclosure is prepared for agency response. If the agency cannot resolve the issue or justify the reasons behind the action of non-compliance, the letter and supporting documentation is made available to the public as evidence that an agency has not complied with its statutory obligations. A letter of foreclosure can be used in a legal action against the agency in a civil court to recover damages. Such an outcome is to be avoided as it is usually adverse in public opinion and is career damaging. Similarly, an agency is responsible for ensuring that **Intentional adverse effects by applicants** [36 CFR § 800.9(c)] does not occur. This portion of the Part 800

Process simply means that the agency cannot grant or guarantee loans, issue permits or licenses, or provide other assistance to any applicant that intentionally modifies, demolishes, or damages an historic property so that Section 106 consultation can be avoided. A possible scenario would be an applicant for a flood control project that proceeds to buyout and demolish historic buildings and structures, or alters the land surface in order to remove archeological deposits, within the potential project area in order to avoid potential project delays.

A portion of the revised Part 800 Process has now incorporated a provision for **Coordination with the National Environmental Policy Act** [36 CFR § 800.8]. This provision has not been fully defined as yet but does encourage agencies to coordinate Section 106 into the steps utilized to meet the **National Environmental Policy Act of 1969** (NEPA). Early scoping, public meetings, and any

The applicability of a Categorical Exclusion does not necessarily mean that Section 106 of the NHPA does not apply.

consideration of a Federal action having the potential to affect the human environment, should include a consideration of the undertaking's potential effect on historic properties. **Consulting party rules** [36 CFR § 800.8(a)(2)] notes that the SHPO/THPO, Native American Indian tribes, other consulting parties, and any organization or individuals with an interest in possible effects on historic properties, should be prepared to consult early in the NEPA process so that the broadest range of alternatives can be considered. The agency needs to ensure that an **Environmental Assessment**, the **Finding of No Significant Impact**, an **Environmental Impact Statement**, and any **Record of Decision**, needs to specifically address **Inclusion of historic preservation issues** [36 CFR § 800.8(a)(3)] including; notification to consulting and other parties, identification and assessment of historic properties, assessment of effects, and any resolution of adverse effects, just as in the standard Part 800 Process. It also notes that the use of **categorical exclusions** needs to be reviewed by the agency to determine if an undertaking per Section 106 still exists [36 CFR § 800.8(b)]. While a categorical exclusion could permit the action to proceed without further NEPA review, it does not necessarily mean that Section 106 has been satisfied. If an agency decides that it will **Use the NEPA process for Section 106 purposes** [36 CFR § 800.8(c)], the agency must notify the SHPO/THPO and the ACHP that it will be doing so and meet the **Standards for developing environmental documents to comply with Section 106** [36 CFR § 800.8(c)(1)]. Essentially, this set of standards for submitting NEPA documents is little different than from the standard Part 800 Process of identifying consulting parties, identification and assessment of historic properties, consulting on the effects of the undertaking, review of determinations, resolution of objections, and approval of the undertaking. However, it could potentially be a cost and time saving measure if the process becomes refined enough that it is simply not a duplication of effort.

Section 110

Section 110 was developed for the 1980 amendments to the NHPA and was originally outlined in *Protection and Enhancement of the Cultural Environment* (1971)[EO 11593], an Executive Order signed by then President Richard M. Nixon. Section 110 was expanded again during the 1992 amendments to the NHPA to include references to compliance with such directives as the 1990 *Native American Graves Protection and Repatriation Act*. No regulatory guidance has been issued for this section but the

Secretary of the Interior did issue a *Guidelines for Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act* [53 FR 4727-46] in 1988 that provided subsection-by-subsection guidance. Section 110 of the NHPA has several component subsections that direct the management of historic preservation by Federal agencies. Principal among these is the directive to ensure:

“...that the agency's procedures for compliance with section 106 are: consistent with regulations issued by the Council pursuant to section 211 (the Part 800 Process).” [16 USC 470h-2(a)(2)(E)]

That is, the agency must comply with the requirements of Section 106 to consider its effects on NRHP properties, and it must utilize the Part 800 Process to do so. Also contained in the Section 110 mandate are the directives for Federal agencies to:

“...assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(g), any preservation, as may be necessary to carry out this section(.) [16 USC 470h-2(a)(1)]; and that

“(E)ach Federal agency shall establish, in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the *National Register of Historic Places*, and protection of historic properties(.)” [16 USC 470h-2(a)(2)]; and

“...that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning(;)” [16 USC 470h-2(a)(2)(C)]; and

“...that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector(;)” [16 USC 470h-2(a)(2)(D)]; and that

“(E)ach Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, a historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 101(a), in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference(.)” [16 USC 470h-2(b)]; and

“(T)he head of each Federal agency shall, unless exempted under section 214, designate a qualified official to be known as the agency's “preservation officer” (**Federal Preservation Officer**) who shall be responsible for coordinating that agency's activities under this Act(.)” [16 USC 470h-2(c)]

Section 110 requires that agencies:

- Assume responsibility historic properties;
- Establish programs to identify and protect historic properties;
- Ensure appropriate records are made of properties that are to be demolished or altered;
- Designate a Federal Preservation Officer to oversee the agency's preservation program;
- Ensure that preservation programs meet the intent and purpose of the NHPA; and
- Minimize harm to National Historic Landmarks.

In brief, Section 110 of the Act requires the heads of all Federal agencies to assume responsibility for the preservation of historic properties located on or controlled by the respective agency. Occasionally, the ownership and control issue appears during certain projects. While it is sometimes convenient to consider that a project is only a right of way or an easement and therefore not a potential undertaking per Section 106 of the NHPA because of ownership, it becomes an issue of substantive control. While there is no direct title to the land, and the project may only have a bare use permit to enter the property to accomplish the project such as across an easement, any impact associated with the use of the land which has a direct or indirect (consider future potential) impacts to known or unknown historic properties, is considered to be the responsibility of the agency and is therefore subject to a Section 106 review. Concurrent with this is the requirement to consider an **area of potential effect** (APE) where both ownership and direct project impacts are not the issue but the potential impacts caused to adjacent properties are.

Section 110 incorporates the mandate that each Federal agency is required to undertake a program to locate, inventory, and nominate to the Secretary of the Interior all properties owned or under control of the agency that appear to qualify for inclusion on the *National Register of Historic Places*. The original 1971 EO [11593] that set out this requirement also established a date (1 July 1973) for all Federal agencies to have completed the survey and inventory effort, plus the assessment and nomination of all NRHP eligible properties. The subsequent additions to the NHPA as Section 110 have been interpreted instead to mean the establishment of a "program" rather than an all out intensive effort to locate all NRHP eligible properties on Federally-controlled or owned lands. Thus, the requirement to survey and inventory for listed and unknown NRHP properties on, adjacent to, or associated with, project undertakings is generally completed as part of the project planning phases. On military installations, surveys are generally ongoing and typically receive some level of funding to accomplish these tasks on an annual basis. Similarly, funding is available for such survey and inventory efforts on lands held by USACE such as lakes and other properties.

The requirement that historic properties must be recorded and documented in the event of their damage or destruction due to any Federal agency activity is a component of Section 106 compliance usually seen as part of a **No adverse effect** determination or as a result of agreement on the treatment of historic properties as established in a Memorandum of Agreement or a Programmatic Agreement. Such documentation, usually called **mitigation**, can take several different forms and levels of documentation. Substantially, documentation will adequately explicate and illustrate what is significant or valuable about the property and make such documentation available to the public either through distribution, or housing in a library or museum, or both. Typically on archeological sites, a data recovery project involves the large-scale excavation of an archeological site, according to a **research design** and a **context**. Such archeological mitigation projects can vary significantly in costs and time to complete because of site

size, depth and complexity of deposits, and site location. Similarly, documentation of buildings and structures can also vary in level of effort, cost, and time. The most utilized method of documentation has been the use of standards established by the **Historic American Building Survey** and **Historic American Engineering Record** (HABS/HAER) divisions of the National Park Service. The use of these standards of documentation for both archeological and built properties has relaxed in recent years and alternative mitigative procedures such as production of broadcast quality videos, public interpretive exhibits, preservation of selected portions of properties or elements of structures, and documents which do not chronicle the property or structure but instead provide a historical account of the people and associative events affiliated with the property.

While it is unlikely to impact management responsibilities at CESWF operating project lakes, an important directive contained in Section 110 is the mandate to provide special consideration to properties with National Historic Landmark (NHL) [PL 74-292; 16 USC 461] status, including consultation with the ACHP when they will be adversely affected [16 USC 470h-2)(f)]. It is provided here for informational purposes. NHLs are properties, while also listed on the NRHP, are considered of special significance to this country. While NHLs are generally thought of as places where significant sobering events have occurred such as at Gettysburg or Wounded Knee, the



list of NHLs also includes the penultimate property of the US Capitol and the quirky Lucy, the Margate, New Jersey elephant. They are part of the **National Historic Landmarks Program** [36 CFR 65] which identifies, designates, recognizes, lists, and monitors National Historic

Landmarks and is conducted by the Secretary of the Interior through the National Park Service. For any undertaking that on or adjacent to an NHL, where the project could cause an effect on any portion, including the viewshed, of an NHL, the ACHP and the Secretary of the Interior must be invited to consult.

Section 111

Section 111 of NHPA [16 USC 470h-3] is pertinent to this discussion because it does relate to the increasing government need to excess or find alternative uses for buildings and property under its ownership or control. Principally, an agency should:

“...explore alternatives for ensuring the preservation of historic properties under its ownership that are not needed for current or projected agency purposes.

The HABS/HAER standards usually consist of:

- Level I measured drawings of floor plans, elevations, equipment schematics, and other significant parts of structures where no other drawings exist, accompanied by photographs and handwritten data;
- Level II can substitute existing architectural or engineering plans for measured drawings, and also include photographs and written data;
- Level III documentation can use sketch plans that supplement photographs and written data; and
- Level IV is a simple inventory data card supplemented with a photograph.



These alternatives include leases or exchanges to any person or organization, and contracts for management.” [16 USC 470h-3(a)]

In brief this simply means that an agency needs to look at all reasonable alternatives for adaptive use, including leases to other agencies, public entities, and corporations, where the historic property will have adequate restrictions placed on any proposed alterations and modifications to ensure the preservation of the historic property. The same circumstance applies to the exchange of property. Remember, any lease, sale, or exchange of a historic property is considered an undertaking per Section 106 of the Act and the Part 800 Process must be applied. A consideration here is the agency-to-agency exchange or simple transfer of property (usually called a Federal-to-Federal transfer) between Federal agencies. Such a transfer is still an undertaking but can be the subject of an agency determination that there is **No potential to cause effects** [36 CFR § 800.3(a)(1)] because any accepting agency will still be required to take on the requirements of Section 106 for the property. While a **No potential to cause effects** determination where no further Section 106 consultation is required is probably acceptable, it is cautionary, and an agency may want to consider making a determination of **No historic properties affected** [36 CFR § 800.4(d)(1)] and providing the SHPO/THPO and other parties a letter stating that determination. Under these conditions of a Federal-to-Federal transfer there is no need to complete inventories and assessments for known or unknown historic properties. These circumstances can also apply to transfers of property to the General Services Administration (GSA) for subsequent disposal if GSA accepts the responsibility to complete all Section 106 requirements before disposal.

Section 111 also provides that the proceeds of any lease may be retained by the agency and used to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to properties that are on the NRHP [16 USC 470h-3(b)]. The critical element for this offset is that the property must be actually listed, rather than having a concurrence determination, on the NRHP. However, such an offset should be considered because of the extra costs usually associated with the maintenance and preservation of historic properties.

Section 112

Section 112 of the NHPA requires that any Federal agency responsible for the protection of historic properties ensure that all actions taken on these properties are done by people meeting professional standards developed by the Secretary of the Interior. This includes both agency and contract personnel. These standards are yet to be developed and issued by the Office of Personnel Management. In the interim, the standards and guidelines for professional qualifications as found in *Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines* [48 FR 44716] should be utilized.

Section 112 requires that agencies ensure that adequately qualified personnel manage and execute preservation related activities.

Section 112 also iterates that all data and records produced through historical research are to be permanently curated in appropriate databases, and are to be made available for use by researchers. This directive is an attempt to ensure that reports and other documentation prepared as part of any consideration of NRHP properties is made a part

of a permanent record and not discarded after consultation is complete or reports are finalized.

ARCHEOLOGICAL RESOURCES PROTECTION ACT

The *Archaeological Resources Protection Act of 1979* (ARPA) [PL 96-95; 16 USC 470aa-mm *et seq.*] regulates the removal of archaeological resources from Federally-owned or administered lands and those lands that are Native American Indian tribally-owned or held in trust (Tribal Lands) through a permitting process. The current Act is actually an expansion to the *Antiquities Act of 1906* [PL 59-209] which was regulated by the *Preservation of American Antiquities* [43 CFR 3] and was established early in this century to prevent the wholesale looting (especially in the southwest and in the Mississippi and Ohio River valley) of objects such as pottery and burials which contained valuable artifacts. While ARPA strictly regulates the removal of archeological resources from Federally-owned lands, it also attempts to carry forth a prohibition similar to the Antiquities Act on the sale, purchase, transport, or entry into interstate commerce of items taken in violation of the Act.

The implementing regulation for ARPA and specific to the Department of Defense (DoD) is *Protection of Archeological Resources: Uniform Regulations* [32 CFR 229]. The regulation identifies the procedural steps for DoD components with regard to prohibited acts, permits, notification to Native American Indian tribes, determination of archeological and commercial value, and civil and criminal penalties. Penalties include fines up to \$100,000.00 and/or one year in prison for up to \$500.00 in damages (misdemeanor offense), and fines up to \$250,000.00 and/or five years in prison for damages over \$500.00 (felony offense). A second offense (regardless of first) is \$250,000.00 and five years in prison. Forfeiture of property (vehicles, boats, equipment, and real property utilized in the commission of the crime) is possible for even a first offense. The language in the present Act does not reflect the changes established by Omnibus Crime Control Act of 1981. Enforcement and arrest is by jurisdictional authority (city, county, State, US Marshall). ARPA has applicability to project lands obtained in fee title as part of an operating project and is an important management resource on operating projects where systematic or casual archeological site looting or vandalism is occurring.

The implementing regulation [32 CFR 229] has a specific requirement for archeological resources and clearly defines them as the material remains of human life or activities which are at least 100 years old and are of archeological interest (meaning they are capable of providing scientific or humanistic understandings of human behavior). Categories of resources are very broad and can include surface and subsurface remains of structures and earthworks, trails, weapon projectiles, organic waste and other by-products, rock carvings and paintings, shipwrecks, and human remains. While disturbing, destruction, and looting of archeological sites may appear to be the primary focus of ARPA, it is to be noted that it also includes damages to above ground buildings, structures, monuments such as trail markers and cairns, and, importantly, the defacing of rock art by graffiti, wanton destruction or vandalism, or removal of rock panels and boulder from the original locations. Not considered by the

Archeological resources as covered by ARPA are not limited to those properties that are NRHP eligible or listed. All archeological resources are considered with regard to the law.



act for protection are paleontological remains, coins, bullets, unworked minerals, or “arrowheads,” which are not located in an archeological context. This essentially means that, if it is lying on the surface or is in a non-archeological context, there is no penalty attached for collecting or removing it. The concern with this is that almost anything that is lying on the surface is generally derived from an archeological context and is therefore considered part of a site. Even the random collection of material such as debitage and lithic flakes from apparently eroded areas will cumulatively, and adversely, impact the sites. These activities systematically reduce site visibility by removing traces of the archeological site and also impact any possible site patterning that may be present which could define specific activity areas.



There are, of course, other penalties for removing any material from Federally-owned lands and most tribal reservations have severe penalties for taking anything from Native American Indian lands. For operating projects, the most visible enforcement deterrent to prevent removal of archeological resources is the applicability of **36 CFR 327.14(a)**, *Parks, Forests and Public Property; Corps of Engineers, Department of Army; Regulations Governing Public Use of Water Resources Development Projects Administered by the Corps of Engineers*. The cited subsection of the regulation makes the “destruction, injury, defacing, removal, or alteration of public property, including ...historical and archeological features...” a chargeable offense with a fine up to \$5,000.00 and one year imprisonment. Authorized U.S. Army Corps of Engineers Rangers may make these citations.

CESWF Real Estate Division issues ARPA permits within the civil works and military boundaries of this district for archeological excavation or removal of archaeological resources by requesting individuals and organizations. The permits are only issued to qualified cultural resources professionals upon the presentation of the appropriate research design and only after having met certain conditions as defined at 32 CFR § 229.6 (***Application for Permits***) and 32 CFR § 229.8 (***Issuance of Permits***). Applications are processed per ER 405-1-12 and AR 405-80. The operating project may request that the permit applicant provide for any costs associated with the processing of the permit. The operation project should provide CESWF Real Estate a report of availability along with the applicants research design, statement of technical and financial ability to complete the project, and an agreement regarding the appropriate curation of any material collected from the project. Although the issuance of a permit is not considered a Section 106 undertaking, any portion of the planned research that could disturb any NRHP listed or eligible historic property must include proof of consultation of the determination of effect with the report of availability.

The ARPA legislation requires specific consultation with Native American Indian tribes on archeological sites that may have traditional religious or cultural significance that could be impacted as a result of the agencies activities or as a result of any potential permit to remove archeological resources. Such consultation should meet the requirements of the Presidential directive, *Government-to-Government Relations with Native American Tribal Governments* [Presidential Memorandum 29 April 1994]. An

important part of ARPA is the specific reference to exemptions to requests under the *Freedom of Information Act* (FOIA) [PL 89-554 *et seq.*; 5 CFR 552] for site specific information as found in the Department of Defense implementing regulation for ARPA [32 CFR § 229.18].

NATIONAL ENVIRONMENTAL POLICY ACT

The *National Environmental Policy Act of 1969* (NEPA) [PL 91-190; 42 USC 4321 *et seq.*] establishes that it is the responsibility of the Federal Government to:

“...preserve important historic, cultural and natural aspects of our national heritage...(.)” [Section 101(b)(4)]

The basic premise of NEPA is that the proposal, or funding of, a project by a Federal agency requires the preparation of an appropriate document to consider the impact of that project on the environment, include any alternatives to the project, and discuss any known unavoidable impacts to the environment that would result from the implementation of the project or any alternatives. Knowledge of the effects of any project on the environment is to be included in the decision-making process. If there will be adverse effects on the environment, alternatives to the proposed project are presented which could lessen or avoid these effects. All of this is to be provided to the public as a way of disclosing all available information relating to the proposed action. In this way, agency officials, planners, and others, are able to make informed decisions that consider the alternatives, public opinion, and any potential adverse effect to the environment.

Operating projects are seldom confronted with the preparation of a NEPA document except in such instances of conservation pool raises or other alterations to levels, the modernization of powerhouse equipment, or land altering activities which will potentially affect the existing environmental conditions. Therefore, this discussion of NEPA and its consideration of cultural resources is primarily informational as opposed to directional.

The implementing regulation for NEPA is *Purpose, Policy, and Mandate* [40 CFR 1500]. This regulation provides uniform standards applicable throughout the Federal government for conducting environmental reviews and the types of information to be included in the environmental documents as well as how to keep the public informed about the project. Detailed instructions guide the environmental review process from establishing a need for an environmental assessment (EA), through agency planning and development of an environmental impact statement (EIS), to the decision making process. Typically, an EA determines if there will be a significant environmental impact caused by the proposed project. If it is determined that there will be a significant impact, then an EIS is usually developed and written which explains in detail these impacts and alternatives which would reduce or remove the impacts or why the projects impacts are unavoidable and necessary.

Part 1502.16 of *Purpose, policy, and mandate* identifies the incorporation of historic and cultural resources into the development of environmental impact statements. Part 1502.25 of the regulation discusses the integration of the environmental impact analysis with those studies and surveys required by the *National Historic Preservation Act of 1966*. The integration of NEPA with NHPA is very important. For any federal

undertaking, NHPA studies are done to determine the effect of a proposed project on National Register eligible properties. NEPA, however, will only require EIS studies on some proposed federal undertakings. Thus, NHPA studies can occur without NEPA studies, but NEPA studies never occur without NHPA studies. NEPA itself in no way directs, replaces, or supersedes the NHPA. This part of the regulations simply applies to those projects where compliance studies for both the NHPA and the NEPA are undertaken concurrently. The important part of NEPA is the inclusion of historic and cultural properties in its use of the term "environment." Thus, when an EA or EIS is conducted, it includes these properties and scoping, public meetings, and any consideration of a Federal action having the potential to affect the human environment, should also include a consideration of the undertaking's potential effect on historic properties.

As discussed in the section of this handbook regarding Section 106 of the NHPA and 18 May 1999 revised Part 800 Process, there is now a provision for coordinating NEPA with the Section 106 review. If an agency decides that it will **Use the NEPA process for Section 106 purposes** [36 CFR § 800.8(c)], the agency must notify the SHPO/THPO and the ACHP that it will be doing so and meet the **Standards for developing environmental documents to comply with Section 106** [36 CFR § 800.8(c)(1)]. The approaches used in the NEPA public involvement process to meet the public participation requirements is an excellent way to meet the requirements of public consultation as now required by the revised Section 106 process. A critical element is that the interested Native American Indian tribes, consulting parties, and other interested public are not typically on the distribution lists for EA and EIS documents. If these parties are to be included in any NEPA compliance being substituted for the Part 800 Process for historic properties, there will have to be a specific effort to identify those additional parties.

An issue of concern for Lakes Operations Managers is the applicability of categorical exclusions (CX) permitted as part of an agency regulation, nationwide permit, or programmatic agreement. While a CX could permit the action to proceed without further NEPA review, it does not necessarily mean that Section 106 has been satisfied. An undertaking that is permitted as part of a CX should receive review to determine if an undertaking per Section 106 of the NHPA exists.

An additional area of current consideration is a Presidential directive on: *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (1994) issued as EO 12898 on February 11, 1994. This order establishes a national policy to identify minority and low-income populations within or near planned or proposed Federal or Federally-sponsored project areas and give special consideration to determine possible adverse impacts to those populations. While this aspect to be completed as part of the NEPA process will typically only consider such issues as loss of property, employment, and changes in demographic makeup caused by the unequal placement of planned projects, there is a cultural consideration as well. Changes to community cohesiveness, traditional ways of communication, access to significant persons within the community, and loss of landmarks of a long-standing tradition or meaning, must be also considered. There are specific criteria for consideration the environmental justice executive order. The minority or poverty level population that will be directly affected by the proposed project must meet or exceed fifty percent of the

population in the affected region. Simply, the affected population must be substantially impacted by the project and they must reside in the project impact area.

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The *Native American Graves Protection and Repatriation Act of 1990* (NAGPRA) (NAGPRA) [PL 101-601; 25 USC 3001-3013 *et seq.*] acknowledges the ownership of certain Native American human remains, funerary objects, sacred objects, and objects of **cultural patrimony** by Native American tribes or organizations, and to treat these remains and objects in a way that is agreeable to these tribes or organizations. The implementing regulation for NAGPRA is *Native American Graves and Repatriation Act: Final Rule* [43 CFR 10].

Principally, NAGPRA contains two significant sections. The first is the requirement for Federal agencies to inventory existing collections for Native American Indian human remains and items as defined in the Act which are possessed or controlled by Federal or Federally-assisted institutions, curation facilities, or agencies, and begin the process of repatriating, or returning those objects and remains to the appropriate lineal descendants or tribal group. The second significant portion of the Act covers Native American remains or objects discovered on Federal or Tribal Lands after the date of enactment of the Act. The provision may also extend to lands substantially in the control of the Federal agency such as project lands upon which the agency has a right of entry or easement if the Federal action or activity will disturb Native American Indian remains or associated items. In both cases of either current ownership of the inadvertent discovery situation, the Federal land managing agency must notify Native American Indian tribes or organizations of the discovery, providing them an opportunity to issue a claim of affiliation to the remains or objects. The Tribe or organization determined to have the right of ownership of the remains or objects may then consult with the agency to determine what action should be taken with the remains or objects. The agency is responsible for carrying out these determinations. Agency responsibility for such resources as burials covered by the NAGPRA legislation can vary from a request by the affected tribe to avoid the burial, removal and reburial in an alternate location, or possibly a request for study and further information. NAGPRA also makes provisions for the criminal prosecution of those who knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains or objects covered in this Act, whether or not they derive from Federal or Indian lands.

NAGPRA defines the order of repatriation as:

- 1) Lineal descendants; or
- 2) In the case in which such lineal descendants cannot be ascertained:
 - a. To the Indian tribe on whose tribal land such objects or remains were discovered; or
 - b. To the Indian tribe which has the closest cultural affiliation with such remains or objects; or
- 3) If the cultural affiliation cannot be reasonably ascertained and the objects were discovered on Federal land that is recognized as the aboriginal land of some Indian tribe;
 - a. To the Indian tribe that is recognized as aboriginally occupying the area; or
 - b. If it can be shown that a different tribe has a stronger cultural relationship with the remains or objects than the Indian tribe that has the strongest demonstrated relationship.



Of significance to projects within the CESWF area of operations, especially on operating lakes projects, is the inadvertent discovery of Native American Indian human remains, sacred items, or objects of cultural patrimony during project execution. If these remains or objects are inadvertently discovered during an activity for which there is no plan, work must cease immediately in the area of discovery and the requirements of NAGPRA regulations [43 CFR 10.4] are to be followed. The same notification and coordination responsibilities apply with regard to discoveries of remains that are being exposed as a result of natural processes such as erosion and other conditions as created by lakes operations. Discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on Federal or tribal lands by an agency, or any person, must provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal agency official with respect to Federal lands, and, with respect to tribal lands, to the responsible Indian tribe official. If the discovery occurred in connection with an ongoing activity on Federal or tribal lands, the agency or person, in addition to providing the notice described above, must stop the activity in the area of the inadvertent discovery and make an effort to further avoid impacts to the remains or objects. Within three (3) working days after receipt of the written confirmation of notification with respect to Federal lands, the responsible Federal agency official must take certain measures to further secure and protect the remains and/or objects, notify by telephone, with written confirmation, the Native American Indian tribes (or Native Hawaiian organizations) likely to be culturally affiliated with the remains, and initiate consultation on the inadvertent discovery pursuant to 43 CFR 10.5. If the human remains, funerary objects, sacred objects, or objects of cultural patrimony must be excavated or removed they can only be removed under the conditions of an ARPA permit [32 CFR § 229.6]. Concurrently, if the remains or objects can be determined to be a portion or component of an historic property eligible for or listed on the NRHP, the discovery and removal action is subject to a Section 106 review as an undertaking. All conditions of repatriation on the remains or objects must be completed subsequent to any removal. Resumption of the project or activity may occur thirty (30) days after certified notification of the affected Native American Indian tribal group(s) by the Federal agency unless an agreement can be reached sooner. Such work stoppages can be avoided if the agency and the affected Native American Indian tribal groups can determine in consultation prior to project execution a set of measures to employ if such remains are found and how to avoid, remove, and/or return them to the appropriate tribal group. Generally, such agreements are called **comprehensive agreements** or **memorandum of understandings** and define step-by-step outlines of what to do if Native American Indian remains or objects are discovered. Most Native American Indian tribes have a NAGPRA coordinator as a point of contact for issues associated with the Act. However, any consultation with affected tribal groups will need to be prepared for multiple consultations with the tribal leadership, the NAGPRA coordinator, and possibly the traditional leadership as well.

NATIVE AMERICAN INDIAN SPECIFIC ISSUES AND CONSULTATION REQUIREMENTS

Native American Indian concerns are of special interest to any Federal land managing agency. Several mandates have been put forth that direct Federal agencies to give special consideration to Native American Indian tribes with regard to the practice of their

specific religions, access to specific areas and certain resources which are important to tribes, and the manner in which tribes are contacted and consulted with over these issues. For consideration here as part of cultural resource management responsibilities for operating projects, brief discussions are provided on the: *American Indian Religious Freedom Act (AIRFA) of 1978* [PL 95-341; 42 USC 1996 and 1996a]; the Presidential directive *Protecting Indian Sacred Sites* (1996) [EO 13007]; and two 29 April 1994 Presidential Memoranda on the *Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes*, and the *Government-to-Government Relations with Native American Tribal Governments*. Each of these should be made a part of the regular consideration of potential adverse impacts to cultural resources and should be balanced against the operating project's requirements to be able to complete such activities as timber harvest and park constructions, the need to complete the day-to-day maintenance operations, and the specific mission requirements of managing the operating project.



AIRFA is a policy of non-interference with the practice of Native American Indian religions. The Act guarantees access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. Such access and use extends to specific areas identified by the tribe as a component of the religious ceremony and can extend to cemeteries, places such as specific locations on the land, the use of items that have been removed from tribal possession, and non-interference with tribal ceremonies which may involve specific use of certain hallucinogenic substances such as peyote. Nothing in AIRFA is interpreted as a tribal right to collect materials or substances from Federally-owned lands. Similarly, AIRFA was never provided

regulatory guidance and compliance is essentially interpretable. Essentially, the tribe must notify the Federal agency of specific needs for access. While AIRFA states that the access is guaranteed, it failed to provide for a way to minimize impacts to sites of particularly sacred significance. The EO on Sacred Sites clarified this.

The Presidential directive *Protecting Indian Sacred Sites* was issued with a specific requirement for Federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. The directive notes that this accommodation shall be done, to the extent practicable, as permitted by law, and not clearly inconsistent with essential agency functions. As with the AIRFA mandate the Native American Indian tribe must identify any such areas to the agency. The language of the EO specifies that a "sacred site" is taken to mean any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site. The directive also specifies that any consultation completed pursuant to the order shall comply with the EO *Government-to-Government Relations with Native American Tribal Governments* discussed below.

The Presidential memorandum, *Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes*, is of interest here because of the mandate to collect recoverable and salvageable Eagle carcasses and forward them to the National Eagle Repository. The policy states the significance associated with Eagle feathers and part to Native American Indian religious and traditional ceremonies and that the Federal government shall expedite the recovery and transfer of any such Eagle remains.

The Presidential memorandum, *Government-to-Government Relations with Native American Tribal Governments*, is important to any agency because of its requirement for ensuring that agencies operate within a government-to-government relationship with Federally-recognized tribal governments so that Federal plans, projects, programs, and activities on tribal trust resources are considered during the development of such plans, projects, programs, and activities, and that tribal concerns are specifically considered. That is, any consultation on matters of interest to specific Native American Indian tribes is to be conducted as sovereign nation to sovereign nation. While the memorandum originally had the narrow intent of consultation only on projects that affected trust resources such as tribal lands or treaty reserved rights, it has been expanded to include any consultation on any plan or project and mandates a more involved coordination responsibility. Further, the memorandum directs agencies to take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes. Simply, an agency should explore establishing a set of procedures that streamlines the consultation process by establishing protocols, notification procedures, and points of contact.

CURATION OF FEDERALLY-OWNED AND ADMINISTERED ARCHEOLOGICAL COLLECTIONS

The appropriate treatment and preservation of archeological collections which have recovered by Federal agencies either from Federally-owned lands, Tribal Lands or as a result of a Federal project, is set forth in *Curation of Federally-Owned and Administered Archeological Collections* [36 CFR 79]. This regulation establishes definitions, standards, procedures and guidelines to be followed by Federal agencies to preserve collections of prehistoric and historic material remains, and associated records, which have been (or will be) recovered under the authority of the *Antiquities Act of 1906*, the *Archaeological Resources Protection Act of 1979*, the *National Historic Preservation Act of 1966*, the *Reservoir Salvage Act of 1960*, or the *Archeological and Historic Preservation Act of 1974*. Simply, the regulation establishes procedures and guidelines to manage and preserve collections; terms and conditions for Federal agencies to include in contracts, memoranda, agreements or other written instruments with repositories for curatorial services; standards to determine when a **curation** repository has the capability to provide long-term curatorial services; and describes access, loan and transfer conditions for the collections.



The regulation has a consideration for operations management because of the requirement to ensure that a curation facility such as the Texas Archeological Research

Laboratory (TARL) meets specific standards for the appropriate management and security of the collections. The collection of artifacts and other materials, as well as the documentary records produced as part of an investigation, must be curated in a certifiable facility. Individual contractors cannot generally provide this long-term arrangement and neither CESWF nor any of the field operations offices have the capability to create such a facility. Since these facilities typically must charge set fees for long-term management, a consideration of appropriate costs must be included in the project undertaking and programmed in to meet this responsibility.

GENERAL GUIDANCE

In order for this handbook to be effective for lakes management personnel there needs to be a general approach to be utilized in considering and managing cultural resource requirements. There is no way to establish a procedural set of finite steps for completing cultural resources investigations. Simply, there is no one-size-fits-all for these kinds of work efforts and such a document would far exceed the capabilities of this handbook. For the most part however, the cultural resources work efforts can be distilled into a broad discussion of the required areas of consideration.

COORDINATION AND REVIEW

Of prime consideration is to identify potential projects early enough that all required actions, coordination and consultations, are able to be met without any project delays. Occasionally, the cultural component is not begun until the project is ready for execution. The majority of small projects will require only a site visit with an acceptable level of documentation to be filed for record or submitted to the appropriate reviewers. However, if an archeological site happens to be present which could be disturbed, or if other types of properties are present (NAGPRA or others), or if the proposed repairs will disturb intact earth where there is a potential for buried archeological resources, then a larger effort will be required with a substantially higher cost and an extended time frame to completion. Additionally, there are those larger projects that will require further documentation, mitigation, or consultation efforts, and may occur during the construction phase itself. Given the current complexity of cultural resources management laws and regulations and the requirements for extensive consultation efforts, it is imperative that any project be prepared to initiate consultation as soon as a project is defined and begin any required studies as part of defining any proposed project alternatives.

As defined in this handbook, the consultation process is dependent on the presence or absence of historic properties, whether or not there will be any impacts to those properties, the severity of any impacts, and, currently, the level of public or consulting party interest in the outcome of any consultation. For most actions where there are no historic properties affected, or if the impacts can be reduced or avoided in some manner, there is a 30 day response turnaround. This should not be taken to mean that a project manager could expect the entire process to be completed within that time frame. There will have to be a commitment of resources, clear definition of the project and impacts, a process of reporting and analysis, and then the consultation process with the SHPO or THPO. Again, any significant impacts or other issues, requires several coordination and consultation efforts that can stretch into months if not years. While this may be an extreme example, it highlights the importance of starting the process early enough to be able to identify properly the resources, the impacts, the steps need to avoid (or mitigate), and just how controversial the action may be. Waiting until a project is in a plans and specifications phase and the contract for construction is being negotiated is just asking for delays.

For the most part, the guidance provided by EP 1130-2-540 (*Project Operations: Environmental Stewardship and Maintenance Guidance and Procedures*) Chapter 6 (*Cultural Resources Management*) is an appropriate beginning. While this guidance only provides a discussion on actions associated with NHPA Section 106 compliance and does not consider the 1992 revisions of the NHPA or the 18 May 1999 revisions to the Part 800 process, it still establishes some basic steps for completing this effort. Notably missing is any consideration of issues associated with NAGPRA or ARPA, a consideration of potential issues associated with AIRFA or Sacred Sites, and there is no discussion of consultation requirements associated with any of these Acts and orders. Further, the EP does not discuss requirements associated with cultural resources requirements for acquisitions, ingrats, outgrants, disposals, leases, and permitted activities. Essentially it is dependent on whether or not the acquisition or disposal is to another Federal agency, such as the transfer of a property to General Services Administration for subsequent disposal. Typically, the receiving agency becomes responsible for any Section 106 or other requirements for cultural resources. The permitting of outgrants, leases, and other similar activities such as dredging permits where the agency remains the owner of the property, or has a substantial control such as with obtaining a right-of-way, is an undertaking and must be coordinated accordingly. Similarly, the issuance of a permit such as for increasing marina size is also an undertaking and must be coordinated.

With regard to NHPA Section 106 compliance, the recommended approach is that the operating project begins with a literature and records review to determine if historic properties are previously identified in the project area or possibly in proximity to the project area (APE). An on-site visit and pedestrian overview of the area by a qualified individual is highly recommended. The first phase of work needs to review existing information, not only for previous survey and inventory efforts for archeological properties, it also needs to determine if any effort has been made to identify buildings and/or structures of possible significance within the area of potential effects. Such research can be completed with an in-house effort on most small projects such as boat ramp and fence installations. However, large timber harvests, park development, harbor and breaker wall modifications, or other projects planned in areas that are rich in historic properties and archeological sites, are more efficiently made part of a contracted effort. If a larger effort is required, it should be identified at this time and the consultation with the SHPO/THPO be initiated as to the planned compliance measures to be implemented. Those operating projects that have previously identified requesting consulting parties such as individuals, groups, or Native American Indian tribes, should notify them also at this time of the proposed project and the planned measures. Typically, this is done by copy furnishing the consulting party with the SHPO/THPO letter but protocol may require a direct letter of notification. Also note the requirement to consult with the SHPO/THPO on determining the area of potential effect at the outset of consultation per the revised regulation for Section 106 undertakings. While reviewing the existing information for possible NRHP properties, a concurrent review needs to be made to determine the potential for Native American Indian human burials and potential sites of traditional, sacred, or religious importance that could be in the project area. All of this information should be used to establish the need for additional survey, inventory, testing, or consultation, efforts.

Typically on small projects requiring small-scale inventory or survey efforts, some of which can be completed with in-house resources, a well-planned sampling strategy is

adequate for the effort and nothing further would be required if there are no historic properties, Native American Indian burials, or sacred site that will be impacted. Also, even if such properties are present but can be avoided, it would also be possible to have no further requirements. As part of early planning efforts a consideration of avoiding historic properties that have been previously identified, or those that may be discovered by on-going efforts, is needed. That is, by noting that specific resources can be avoided by simply making small changes in a designed project, cost and timesavings can be made. Typically, larger efforts will require that a full identification of all historic properties be made in a report of investigations and that a concurring decision be made regarding the treatment of any potential or recognized NRHP properties present. Occasionally, a determination of NRHP status is required by project conditions where avoidance is not possible. These further studies are generally defined as testing efforts for archeological properties and further extend the time frame for completing coordination and consultation efforts. On projects where it is likely that historic properties would be unavoidable and impacts are predicted, it may be more efficient to utilize an inventory (survey) effort that contains an appropriate testing methodology. Larger studies may utilize such a two-phase approach more effectively, but again, a well-planned initial survey and inventory effort is likely to eliminate any need for an additional effort.

If impacts to NRHP properties are unavoidable, then consultation with the appropriate consulting party, whether SHPO/THPO, Native American Indian tribes, or other parties, must continue so that an appropriate resolution can be made. While the official guidance notes that a memorandum of agreement can be prepared to resolve adverse effects, and that is correct for Section 106 actions, a memorandum of agreement does nothing to resolve NAGPRA or other traditional property issues. Obviously, any properties that are simply unavoidable, such as a NRHP historic property, will have to have a suitable mitigation plan negotiated. For NRHP properties it can be any of the mitigation possibilities discussed in this handbook. For human burials associated with NAGPRA it can be a plan to remove the burial and rebury elsewhere. For traditional cultural properties such as traditionally harvested plants or animals it can be the agreed-upon establishment of the species in another location. The critical element is that, each of these consultations is going to take time. No abbreviated scope of work is going to be able to portray that accurately. The important issue(s) to consider with regard to any project is the size of the project, the potential to encounter a broad or limited range of cultural resources, the flexibility of the project to alter the design, and the controversial nature of the project.

Overall, the first consideration of any project should be to initiate consultation with the appropriate SHPO/THPO and any identified consulting parties as soon as a project is identified. This also applies to other parties as applicable to other Acts and laws as well. The second phase of any project should be to collect as much existing conditions information as can be found and reduce that information to a usable document describing the area, known and suspected resources, and providing any potential problem areas. Problem areas, or areas of potential impacts or issues which could affect the project, can be known NRHP historic properties, areas where additional archeological sites or other properties are suspected, areas where Native American Indian concerns will be significant such as potential burials or sacred site issues, or areas of traditional concern to other groups. This information is basic to being able to alter project conditions in order to minimize any potential impacts and/or determining the

proper methodologies for collecting the information or conducting fieldwork. The third phase of any cultural resources project would be to conduct any additional data. This can be the fieldwork phase, further consultation efforts, and/or defining the need to perform additional work in the form of data recovery (mitigation) or other requirements. These efforts can be compressed depending on the size of a project and previous efforts, or can be expanded into separate and distinct components.

It should be noted that there is no requirement to agree to a reviewing agency or consulting party's comments. There is no requirement that the agency agree with either the SHPO/THPO or the ACHP. The SHPO/THPO, and the role of the ACHP, are advisory only; there are no legislated mandates to agree. However, CESWF, and all other Federal agencies, are bound by the legislation and the applicable regulations to act in a good faith effort. Simply making a determination that CESWF does not need to consult with anyone, or terminating the process early because the consultation is not proceeding the way the agency would like, is not a sufficient attempt at good faith consultation. As provided in this handbook with regard to Section 106 consultations utilizing the Part 800 process, there is no penalty for making a final determination of an inability to reach a consensus as long as the Part 800 Process is completed as set forth in the regulation. If the agency has carried the process to this final conclusion and there is no agreement to be reached, then the agency has the capability to document its decision and proceed with the project. However, the agency needs to be aware that such a final resolution is made at the Secretary of the Army and the Chief of Engineers level. The final determination will also be provided to the President of the United States. Politically, and career-wise, it is not a suggested path unless the agency can absolutely be sure of their correctness in the dispute. Disagreements on other issues, such as with Native American Indian tribes on issues associated with NAGPRA, ARPA, and possibly AIRFA are not specifically defined in the Acts or any regulations. Essentially, these areas are similar to the previous, that the agency makes the final determination.

It is critically important to remember for all cultural resources management that, there are very few shortcuts, there are no easily identifiable sets of procedural steps, and the entire process is oriented toward identification of what is significant to humans. Simply, how do we, as human, begin to agree on what is significant and important to us, how do we ensure that everyone's opinion is considered, what can we do to preserve what is significant, and how do we lessen the impact on people's lives.

COORDINATION AND CONSULTATION

Throughout this handbook there have been numerous references to consultation and coordination requirements as they are associated with various cultural resources management laws. The recent increases in consultation requirements are mandated in several areas and are being made part of many agencies standard operating policies. The revised Part 800 Process was mandated by the 1992 revisions of the NHPA to increase Native American Indian tribal participation in Section 106 decision-making processes. At the same time, a number of organizations such as professional archeological groups, organizations with interests in architecture, engineering, and industrial buildings, were also lobbying to be a stronger participant in the process so that NRHP properties were provided every consideration. In order to balance this expressed desire for an increased participation, the ACHP revised the Part 800 Process so that it specifically includes the requirement to identify any Native American Indian tribes,

consulting parties, and other parties, early, or even prior to beginning planning, so that their participation is not just peripheral, it is mandated to occur throughout the process. Part of the logic behind this was several notable cases where an agency has made a decision regarding the future of an NRHP property and there was never any public involvement. Another significant issue has become the increased integration of cultural resources issues, not just NRHP historic properties, into NEPA studies. Both the public and the Council on Environmental Quality has noted that a large portion of these studies do not adequately address impacts to cultural resources in a manner of public disclosure. The attempt is to broaden the NEPA documents to more adequately include such impacts to cultural resources and bring those issues into a public visibility so that they are also given weight as potentially affecting the human environment. This section of the handbook is a general discussion of public involvement responsibilities for CESWF actions at operating projects that could affect individuals, groups, Native American Indian tribes, or other traditional groups, and attempts to provide some general guidance on how to approach such groups in order to ensure adequate participation regarding project outcomes and possible effects to significant cultural resources.

The majority of consultation that will be of importance to Lakes Managers and other staff will be the consultation that is conducted as part of any NHPA Section 106 undertaking. The revised Part 800 Process makes such consultation a part of the compliance with 36 CFR 800 and such consultation must be documented. The participants in the process are identified as Native American Indian tribes, other consulting parties, and the public. Native American Indian tribes invited to participate in Section 106 consultation must be consulted according to the directive as found in *Government-to-Government Relations with Native American Tribal Governments* [Presidential Memorandum 29 April 1994]. Consulting parties are the primary participants in the Section 106 process and include the agency (CESWF in this case), the SHPO/THPO, Native American Indian tribes and, in some cases, the ACHP when participating. Other consulting parties are those individuals and organizations that have identified the project undertaking as potentially having an effect on historic properties of interest to them. These parties can be almost any individual or group such as historic preservation societies, archeological societies, groups with architectural or engineering interests, or anyone else that can demonstrate an identified concern with the preservation of specific types of historic properties. An important thing to consider is that the party that is seeking to participate as a consulting party must be able to identify a substantiative interest in a property type (or types) that is eligible for, or listed in, the NRHP. A passing interest, or an unsubstantiated association, such as the preservation of properties not eligible for the NRHP, does not qualify as a consulting party. Participants provided consulting party status are to be provided the ability to review all correspondence and reports, comment on agency determinations, and can be invited to be signatories to Part 800 Process resolution of effect documents such as negotiated memoranda and programmatic agreements. While consulting party comments and requests are to be considered during any Section 106 consultation, their refusal to sign a final negotiated Memorandum of Agreement or Programmatic Agreement does not negate the document. A final consideration for Section 106 consultation is to ensure other agencies, entities, and individuals having responsibilities for other components of project completion, regardless of **Lead Agency** status, are included in the planning and execution of CESWF projects.

Consultation as part of completion of NEPA studies and documentation is a well-developed process and has been demonstrated as a suitable approach for involving the

public in the outcome of Federally-planned or supported projects. Its applicability to the increased public consultation requirements of the Part 800 Process is readily apparent and should be utilized with only minor modifications. In order to ensure cultural resources concerns are addressed during NEPA preparations there needs to be an early effort to identify all potential consulting parties, Native American Indian tribes, and other public so that their concerns on potential impacts resulting from the project adequately consider impacts to resources of concern to them. This is not limited to those impacts associated with NRHP properties. The consideration of impacts to properties of cultural significance must be added to those identified potential impacts to NRHP properties as well. Also, and as noted earlier in this handbook, the Presidential directive *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (1994) [EO 12898] must be part of the public consultation. This order establishes a national policy to identify minority and low-income populations within or near planned or proposed Federal or Federally-sponsored project areas and give special consideration to determine possible adverse impacts to those populations. Such consultation with low-income and minority groups needs to take an extra effort approach and cannot rely on traditional public scoping meetings or single language documents.

Identification and notification of consulting parties, public and other parties for both the NHPA and NEPA consultations needs to be started early in the process. Parties interested in the outcome of actions affecting NRHP properties are generally known to the respective SHPO and possibly a THPO (if participating). A list of these individuals can be obtained upon request. Also, it is important to understand that some individuals or groups may be locally associated with the project area, but there may be other organizations that are county-wide, statewide, national, and potentially on a worldwide basis. Simply, consultation efforts of this type need to be started early enough to ensure the widest range of participation and allow for the most significant issues to be voiced. Also, the agency has to be aware of the use of specific, or general, issues associated with a project as a means of protest. The creation of issues of concern, sometimes called instant history, is a way to achieve political or economic returns, or simply to provide a roadblock for a perceived unwanted action. Occasionally, this is done by constructing a local identity that is abandoned, or disintegrates, after the action is defeated, modified substantially, or goes forward without changes. Politically, however, it is especially sensitive and requires a significant effort to overcome.

Separately from both NHPA Section 106 and NEPA consultation efforts are those associated with Native American Indians for the *American Indian Religious Freedom Act of 1978* (AIRFA) [PL 95-341; 42 USC 1996 and 1996a] and the Presidential directive *Protecting Indian Sacred Sites* (1996) [EO 13007]. While consultations on these areas could be made part of a NEPA document, and should always be considered during the preparation of NEPA documents, especially where a project may limit or interfere with Native American Indian traditional practices, for the most part it is better to attempt these discussions separately. Most Native American Indian tribes are reluctant to disclose sensitive information regarding location of sacred sites, special plants or animals taken traditionally, or the location of religious sites, and consultation could be long and involved. Typically, a full disclosure of such locations is unlikely and only a vague reference to area is possible. But by seeking to understand the requirements of the practitioners it may be possible to provide the sought after protection, cause no significant disruption or impact, and identify a way to complete the planned project without further controversy. Also, it is a responsibility of the agency to maintain

appropriate confidentiality of locations identified as part of AIRFA or Sacred Sites consultations. A specific issue is the requirements of the *Freedom of Information Act* (FOIA) [PL 89-554 *et seq.*; 5 CFR 552] to provide the public with information produced and maintained by Federal agencies. Neither AIRFA nor the Sacred Sites EO contain a provision for protecting such information from a FOIA [PL 89-554 *et seq.*; 5 CFR 552] request. However, if the sites are considered as part of compliance with ARPA, it could be possible to have a policy of non-disclosure as provided by 32 CFR § 229.18 of ARPA, the specific reference to exemptions to requests under the Department of Defense implementing regulation for ARPA, *Protecting Archeological Sites*. Also, be aware that the legislative mandate contained in AIRFA does not specifically require consultation on sacred sites or areas of concern. AIRFA itself is a non-disturbance of religious practices order that simply prohibits the activities of an agency from preventing those practices.

Two additional areas of consultation are associated only with Native American Indians and the requirements of the ARPA and the NAGPRA. Consultation with tribes is required as part of these two legislative areas and requires a fundamental knowledge of tribal interest, protocol, and an ability, or willingness, to conduct consultations on a government-to-government basis. Both legislative areas are particularly sensitive to most tribal groups and consultation must be respectful of cultural traditions and sensitivities. For example, NAGPRA issues over Native American Indian human remains and associated items extend beyond simply identifying the remains, ensuring custody, and completing repatriation or reburial efforts as discussed earlier. Such remains are to be treated with all due respect. The public display, photographing, making available informational studies, including newspaper and professional journals, is offensive and can cause a breakdown of communications. Again, applicability of FOIA requests is an issue and is best handled per ARPA.

Two final areas of concern in consulting with Native American Indian tribes on any of the foregoing legislative or executively mandated issues is timeliness of the consultation and with which tribes' consultation is required. Adequate time for consultation is essential. Consultation must be started early in project planning and be prepared for a lengthy period of discussion. There are also tribal protocols and political issues which can sideline any well-meaning effort. Be aware that the current tribal leadership, whether elected or otherwise, may not be the same as a traditional leadership. In fact, the two entities may be at odds over tribal management and could use the specific consultation issue as a political agenda. As any part of tribal consultation, the consultation may have to fit within the tribe's regularly scheduled council meetings, and the agency should be prepared to commit an appropriate representative to these meetings - a representative who has the authority to negotiate, enter into agreements, and occasionally commit to ensuring certain actions are completed. Consultation with the appropriate Native American Indian tribes is difficult as the legislative and executive mandates are not consistent as to whether only Federally-recognized Native American Indian tribes are to be consulted with, or if the consultation effort is to include those tribes which have not received (for various reasons) Federally-recognized status. Simply, for the NHPA and NEPA, both recognized and non-recognized tribes are to be included in the consultations. For NAGPRA issues, only Federally-recognized tribes have consultation status. For ARPA, only Federally-recognized tribes have consultation status, however, Native Hawaiian organizations are excluded from any consideration. For AIRFA, there is no consultation with any group specified. It is, of course, in the best interests of any agency to ensure such consultation efforts are undertaken in good faith.

Important points to remember and utilize when developing any consultation effort is to attempt to establish a plan for consultation that identifies issues such as: the necessary participants (members of the public, social groups, professional organizations, environmental activist organizations, specific Native American Indian tribes, and individuals that have specifically sought inclusion based on their specified interest); the necessary protocols for providing information (formal presentation at town hall meetings, presentations at tribal council meetings, information letters, or other venues); and a consideration of the time frame for completing the consultation. Any consultation must have meaningful participation by all of the parties; this process can occasionally be lengthy, especially when the issue is controversial.

CONCLUDING REMARKS

The information presented in this handbook has attempted to portray the both the complexity of cultural resources management and the intricacy of the legal mandates that guide and regulate this management. Additionally, the handbook attempts to provide a basis for understanding the need to involve all parties in decisions that might affect properties of concern to them.

The handbook has also attempted to introduce the reader to specific definitions regarding what constitutes historic properties as well as properties of a traditional significance. Along with these definitions the concept of significance and importance has been discussed along with a discourse of how projects might adversely impact the significance of these properties. Notably, readers of this document should now understand that any number of activities have the potential to impact historic properties and properties of traditional significance. It is the emphasis on appropriate planning and a consideration of the potential to impact properties that the handbook has attempted to portray.

Appropriate land management activities can only be met when considering all applicable statutes and concerns. Not considering these responsibilities, or waiting until the issue becomes crisis management, is simply seeking controversy. We administer lands for the public benefit and our management activities and procedures must reflect that responsibility.

DEFINITIONS

Adverse Effect occurs when an undertaking diminishes the integrity of a **historic property's** location, design, setting, materials, workmanship, feeling, or association. See definition of Effect.

Advisory Council on Historic Preservation (ACHP or "Council") is an independent Federal agency established pursuant to Section 201 of the National Historic Preservation Act (NHPA). Under Section 106 of NHPA, the Council must be afforded an opportunity for comment on Federal, Federally-assisted, or Federally-licensed undertakings that may affect cultural resources listed on or eligible for listing on the *National Register of Historic Places*.

Agency means Federal agency as such term is defined in section 551 of Title 5, United States Code. An **Agency Head** (or Agency Official) is the chief official at a Federal agency responsible for all aspects of that agency's actions.

Area of Potential Effect(s) means the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. It is not limited to the specific project area.

Archaeological Resources as identified by ARPA means any material remains of past human life or activities which are of archaeological interest and is at least 100 years of age. These include, but are not limited to: pottery, basketry, bottles, weapons projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. Non-fossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources unless found in an archaeological context. Coins, bullets and arrowheads are not considered archeological resources unless found in an archeological context.

Categorical Exclusion refers to actions which do not individually or cumulatively have an effect on the human environment and have been found by the Council on Environmental Quality to have no effect as defined in the procedures set out by Federal agencies as implementing regulations.

Comprehensive Agreement (CA) has been typically associated with *Native American Graves Protection and Repatriation Act* (NAGPRA) issues but could be applied on a broader scale with Native American Indian tribes. In general a CA is a agreement negotiated between an agency and one or more tribes on how human remains or other objects of cultural patrimony are to be treated if discovered during a project, or program, undertaking or series of undertaking. The logic of this broad document is to have in place a set of established procedures which would allow the agency to continue its action, pending completion of the stated procedures, without project stoppage. See also **Memorandum of Understanding**.

Consulting Parties are defined as those parties which have consultive roles in the Section 106 process. This includes the SHPO/THPO, the ACHP, Native American Indian tribes, Native Hawaiian organizations, Native Alaskan villages and corporations, traditional tribal leaders, representatives of local governments, applicants for Federal

assistance, other agencies (Federal or State), institutions, foundations, professional organizations, preservation groups, and specific individuals from the public with a demonstrable interest in the outcome of the process.

Context is a statement or information about a property or group of properties and their relation to historic trends, themes, and settings, which demonstrate or portray certain aspects of prehistory, events or periods in history. It provides a framework for determining the significance of a property in relation to other properties.

Continuing Authority Program (CAP) is the general authority provided by Congress to USACE in several laws which permits the Secretary of the Army and the Chief of Engineers to authorize and construct small projects within fiscal year appropriations specified by law.

Cultural Patrimony means those objects having ongoing historical, traditional, or cultural importance central to any Native American group or culture. It does not include items individually owned by tribal members. This use of cultural patrimony is similar to the use of **Cultural Items** as used in the *Native American Graves Protection and Repatriation Act* (NAGPRA) wherein it includes human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.

Cultural Resource is a broad term applied to places, sites, buildings, structures, objects, cultural practices, or collections of these physical and nonphysical manifestations which have significance to humans.

Curation is the long-term management and preservation of collections according to professional museum and archival practices. It also includes processing of material collected.

District is a reference to a geographically definable area with a concentration of **historic properties** that are united by theme, style, or association with events. Typically the use of the term district is used in association with a grouping of NRHP eligible or listed properties. These properties can be archeological, architectural, or engineering types of resources.

Effect on an historic property occurs when an undertaking may alter characteristics of the property that may qualify it for inclusion on the *National Register of Historic Places*.

Environmental Assessment (EA) is typically a concise document that provides sufficient evidence and analysis to indicate if an **Environmental Impact Statement** is required or the preparation of a **finding of no significant impact** is justified.

Environmental Impact Statement (EIS) means a detailed written statement as required by Section 102(2)(C) of the NEPA. It is to provide a full and fair discussion, generally called a disclosure document, of any environmental impacts associated with a proposed action, all of the reasonable alternatives considered, and provides the decision-makers and the public adequate information regarding reasonable alternatives which could reduce or minimize impacts to the human environment. See also **Record of Decision**.

Federal Preservation Officer (FPO) is the individual appointed to coordinate an agency's coordination requirements with the *National Historic Preservation Act* and implementing regulations. The position has been generally expanded to include a role of general cultural resources management.

Finding of No Significant Impact (FONSI) provides the reasons why a Federal agency finds that an action will not have a significant effect on the human environment, and therefore is the reason that an **Environmental Impact Statement** will not be prepared. A so-called "mitigated FONSI" refers to a proposed action and the measures that will be undertaken to reduce significant effects.

Foreclosure (also **Letter of Foreclosure**) means an action taken by an agency (or agency official), including approval of an undertaking, that effectively precludes the ACHP (or its agent the SHPO/THPO) from making comments on an undertaking or being able to consider alternatives. The formal response and notification to the agency that it has violated the regulation and law has become known as a **Letter of Foreclosure**.

Historic American Building Survey / Historic American Engineering Record (HABS/HAER) is a reference to a program which reflects the Federal Government's commitment to preserve important architectural, engineering and industrial sites through programs that document outstanding examples of this country's heritage. Measured architectural and engineering drawings, large-format photography and written histories are available to the general public through the HABS/HAER Collections which are housed, serviced and maintained by the Library of Congress, Prints and Photographs Division. The Historic American Buildings Survey (HABS) operates under congressional authority from the *Historic Sites Act of 1935*. The Historic American Engineering Record, established in 1969, documents America's industrial, maritime and engineering history.

Historic Property(ies) means any prehistoric or historic district, site, building, structure, or object, included on, or eligible for inclusion on, the *National Register of Historic Places*. This term also includes artifacts, records, and material remains related to such a property. The term "eligible for inclusion" means resources which have been the subject of consultation and agreement between an agency and the SHPO/THPO on a property's eligibility and is called a "concurrence determination" and must be treated as if they have been formally determined eligible, or officially listed through the nomination process, by the *Keeper of the National Register*.

Keeper of the National Register (Keeper) is the individual delegated authority by the National Park Service to list properties in the *National Register of Historic Places* and make determinations of eligibility.

Lead Agency is a term used to identify a specific Federal agency which is assuming the responsibility for an undertaking which would involve several other agencies. The lead agency assumes the responsibility for ensuring that all coordination and consultation requirements are met and any agreements or stipulations are fulfilled.

Letter of Foreclosure (see Foreclosure)

Memorandum of Agreement (MOA) is an agreement which records the terms and conditions to resolve adverse effects of an undertaking on a historic property. Under the revised Part 800 Process, the signatories to an MOA are the agency and the SHPO/THPO. The ACHP also signs if participating in the consultation and any consulting party can sign as a concurring signatory. An MOA is typically applied to individual actions and smaller projects where the effects are known and predictable. (See also Programmatic Agreement)

Memorandum of Understanding (MOU) is a general agreement which can record an agreement between entities (agencies, Native American Indians or tribes, preservation societies, others) and can specify arrangements for support, protocol to be addressed, or practically anything that can be agreed upon between parties.

National Historic Landmark (NHL) is a district, site, building, structure, or object in public or private ownership, judged by the Secretary of the Interior to possess national significance in American history, archeology, architecture, engineering, and culture, and so designated in accordance with the **National Historic Landmarks Program** (36 CFR Part 65). NHLs are listed on the *National Register of Historic Places*. Because of the extraordinary significance associated with an NHL, the ACHP and National Park Service must be invited to consult on any adverse effects to an NHL along with the SHPO/THPO.

National Register of Historic Places (also National Register) is the official list of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture maintained by the Secretary of the Interior (36 CFR Part 60) and administered by the *Keeper of the National Register*.

Native American Indian (or Indian, Indian tribe, or tribe) means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Programmatic Agreement (PA) is similar to a **Memorandum of Agreement** as it also records the terms and conditions to resolve adverse effects of an undertaking on historic properties. However, a PA can be a more inclusive document and cover such contingencies as unknown effects, effects that are predictable and repetitive, and can provide for alternative consultation and coordination procedures. A PA is typically applied to large undertaking with multiple and ongoing phases. The signatories to a PA are the agency, the SHPO/THPO, and the ACHP. Other agencies, Native American Indian tribes, can also be signatories if they have a defined responsibility. Consulting parties can also sign as a concurring signatory or as full signatories if they are responsible to complete some part of the PA. (see also **Memorandum of Agreement**)

Public (formerly "interested public"), depending on which Act is being applied, is typically meant to imply any individuals, organizations, social organization or groups, which have an interest in the particular project. The agency must seek the views of the

public that reflects the nature and complexity of the undertaking. For projects under review for Section 106, the public is participating if they can demonstrate a substantial interest in the outcome of the Part 800 Process consultations.

Record of Decision (ROD) is a concise public record of the decision reached as a result of an EIS study. If this decision document is produced as part of the use of NEPA in place of the Part 800 Process, it must contain the measures and stipulations which were identified as part of the resolution of adverse effects on NRHP properties. (See **Environmental Impact Study**)

Research Design means a systematic and explanatory document detailing a proposed research effort, the methodology to be employed, and the expected results. Typically, a research design must be developed for any mitigation of an archeological site whether the mitigation is part of a memorandum of agreement or part of a programmatic agreement developed for the project.

Secretary of the Interior is the appointed head of preservation activities in this country and is responsible for the oversight operations of the individual SHPO offices, the ACHP, and the National Park Service's administration of its historic preservation programs.

Significance is the term used to measure a resource's eligibility for the *National Register of Historic Places* according to the criteria in 36 CFR 60.4. It is not necessarily that a property is somehow unique, but that the property must be significant in order to qualify for listing.

State Historic Preservation Officer (SHPO) is the official appointed or designated by the Governor of an individual state to administer the State historic preservation program pursuant to Section 101(b)(1) of the NHPA. The SHPO also serves to provide oversight to the Federal compliance program associated with the NHPA.

Traditional Cultural Property is generally defined in *National Register Bulletin 38* as a property that is eligible for inclusion on the *National Register of Historic Places* because of its association with cultural practices or beliefs of a living community that: (1) are rooted in that community's history and (2) are important in maintaining the continuing cultural identity of the community. A traditional cultural property can also be a property that is not necessarily eligible for the *National Register of Historic Places* but is worthy of consideration and subject to consultation on any potential effects to the property or the practice.

Tribal Land(s) refers to all lands under the jurisdiction or control of a Native American Indian tribe, Native Hawaiian organization, or Native Alaskan village or corporation, within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Tribal Historic Preservation Officer (THPO) is an individual designated by a tribe or by tribal ordinance to administer the tribal historic preservation program, and to assume the responsibilities a SHPO for purposes of Section 106 in accordance with Section 101(d)(2)(B) of the NHPA and as certified by the Secretary of the Interior. The THPO is generally limited to tribal lands but a THPO can seek to be a consulting party off tribal

lands when a resource is of particular concern to the tribe, or if the SHPO requests their participation.

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of the agency, carried out with Federal financial assistance, activities requiring a Federal permit, license, or approval, and those activities subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

NATIVE AMERICAN INDIAN TRIBAL POINTS OF CONTACT

For operating projects in the northeastern portion of Texas the Federally-recognized Native American Indian tribe is the Caddo Nation of Oklahoma. These current points of contact are:

Caddo Nation of Oklahoma
ATTN: Honorable LaRue Parker,
President
P.O. Box 487
Binger, Oklahoma 73009

Caddo Nation of Oklahoma
ATTN: Mr. Robert Cast,
Historic Preservation Officer
P.O. Box 487
Binger, Oklahoma 73009

Caddo Nation of Oklahoma
ATTN: Mr. Bobby Gonzalez,
NAGPRA Coordinator
P.O. Box 487
Binger, Oklahoma 73009

For operating projects in the eastern central portion of Texas the Federally-recognized Native American Indian tribe is the Caddo Nation of Oklahoma (above) and the Alabama-Coushatta Tribe. The current points of contact are:

Alabama-Coushatta Tribe
ATTN: Honorable Frances Battise and Honorable Perry Williams,
Co-Chairpersons
Route 3, Box 659
Livingston, Texas 77351

Alabama-Coushatta Tribe
ATTN: Mr. Morris R. Bullock
NAGPRA Coordinator
Route 3, Box 640
Livingston, Texas 77351

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